Supreme Court, U.S.
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No._____

In The

Supreme Court of The United States

October Term, 1997

CORNELIA WHITNER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

MALISSA ANN CRAWLEY,

Petitioner,

v.

MICHAEL MOORE, AS DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the South Carolina Supreme Court's unprecedented and unforeseeable decision reinterpreting the state's criminal child endangerment statute to expand the definition of "child" in "legal custody" to include a viable fetus violates the Fourteenth Amendment's requirement of due process notice and its prohibition against vague criminal statutes?

PARTIES BELOW

The parties before this Court are petitioners Cornelia Whitner and Malissa Ann Crawley, and respondents State of South Carolina and Michael Moore, as Director of the South Carolina Department of Corrections.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

ARGUMENT 12

I. BY REINTERPRETING THE WORD "CHILD," THE *WHITNER* COURT HAS ENGENDERED A CONFLICT AMONG THE NATION'S STATE HIGH COURTS REGARDING THE SCOPE OF FEDERAL DUE PROCESS GUARANTEES 12

II. THE SOUTH CAROLINA SUPREME COURT MISCONSTRUED THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS NOTICE AND THUS UNFORESEEABLY EXPANDED THE STATE'S CHILD NEGLECT STATUTE 17

III. THE SOUTH CAROLINA SUPREME COURT MISCONSTRUED THE CONSTITUTIONAL PROHIBITION AGAINST VAGUE CRIMINAL STATUTES 22

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL CASES

BMW of N. Am., Inc. v. Gore, 517 U.S. 559,
116 S.Ct. 1589 (1996) 22

Bouie v. Columbia, 378 U.S. 347,
84 S.Ct. 1697 (1964) . . . . . passim

Burns v. Alcala, 420 U.S. 575, 95 S.Ct. 1180 (1975) . . . 19

Coates v. City of Cincinnati, 402 U.S. 611,
91 S.Ct. 1686 (1971) 23, 28

Colautti v. Franklin, 439 U.S. 379,
99 S.Ct. 675 (1979) 25, 27

Connally v. General Constr. Co., 269 U.S. 385,
46 S.Ct. 126 (1926) 23

Douglas v. Buder, 412 U.S. 430, 93 S.Ct. 2199 (1973) . . 18

Grayned v. City of Rockford, 408 U.S. 104,
92 S.Ct. 2294 (1972) 23

Hoffman Estates v. Flipside,
Hoffman Estates, Inc., 455 U.S. 489,
102 S.Ct. 1186 (1982) 28

Kolender v. Lawson, 461 U.S. 352,
103 S.Ct. 1855 (1983) 26, 28, 29

Lambert v. California, 355 U.S. 225,
78 S.Ct. 240 (1957) 26

Lanzetta v. New Jersey, 306 U.S. 451,
59 S.Ct. 618 (1939) 17, 22, 23, 24

Marks v. United States, 430 U.S. 188,
97 S.Ct. 990 (1977) 18

Palmer v. Euclid, 402 U.S. 544,
91 S.Ct. 1563 (1971) 18, 23-24

Papachristou v. City of Jacksonville, 405 U.S. 156,
92 S.Ct. 839 (1972) 22-23, 28

Planned Parenthood v. Casey, 505 U.S. 833,
112 S.Ct. 2791 (1992) 21, 29

Posters 'N' Things, Ltd. v. United States, 511 U.S. 513,
114 S.Ct. 1747 (1994) 22

Rabe v. Washington, 405 U.S. 313,
92 S.Ct. 993 (1972) 18

Robinson v. California, 370 U.S. 660,
82 S.Ct. 1417 (1962) 21, 29

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) 21

Shuttlesworth v. City of Birmingham,
382 U.S. 87, 86 S.Ct. 211 (1965) 23

Staples v. United States, 511 U.S. 600,
114 S.Ct. 1793 (1994) 27-28

Thornhill v. Alabama, 310 U.S. 88,
60 S.Ct. 736 (1940) 23

U.A.W. v. Johnson Controls, 499 U.S. 187,
111 S.Ct. 1196 (1991) 24

United States v. Harriss, 347 U.S. 612,
74 S.Ct. 808 (1954) 17, 23

United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298 (1921) 23-24, 25

United States v. Lanier, __ U.S. __, 117 S.Ct. 1219 (1997) 17, 18

United States v. Powell, 423 U.S. 87, 96 S.Ct. 316 (1975) 23

United States v. Reese, 92 U.S. 214 (1876) 28

United States v. United States Gypsum Co., 438 U.S. 422, 98 S.Ct. 2864 (1978) 27, 28

Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977) 29

Wieczorek v. Volkswagenwerk, 731 F.2d 309 (6th Cir. 1984) 15

STATE CASES

In re A.C., 573 A.2d 1235 (D.C. 1990) 24

In re Adoption of Nelson, 202 Kan. 663, 451 P.2d 173 (1969) 19

In re Brown, 228 Ill. Dec. 525, 689 N.E.2d 397 (App. Ct. 1st Dist. 1997) 25

Collins v. State, 890 S.W.2d 893 (Tex. App. El Paso 1994) 12

Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) ..... passim

Doe v. Clark, 318 S.C. 274, 457 S.E.2d 336 (1995) 7

Fowler v. Woodward, 244 S.C. 608,
138 S.E.2d 42 (1964) 6, 21

Hall v. Murphy, 236 S.C. 257,
113 S.E.2d 790 (1960) 6, 21

Johnson v. State, 602 So. 2d 1288 (Fla. 1992) . . . . . passim

Jones v. Commonwealth, 830 S.W.2d 877 (Ky. 1992) . . . 16
People v. Doe, 260 Ill. App. 3d 392,
632 N.E.2d 326 (1st Dist. 1994) 24-25

People v. Hardy, 188 Mich. App. 305,
469 N.W.2d 50 (1991), *leave to appeal denied*,
437 Mich. 1046 (1991),
amended, 471 N.W.2d 619 (Mich. 1991) 15, 16

Reinesto v. Superior Court, 182 Ariz. 190,
894 P.2d 733 (Ct. App. 1995) 12

Reyes v. Superior Court of San Bernadino Cty,
75 Cal. App. 3d 214,
141 Cal. Rptr. 912 (4th Dist. 1977) 12

Sheriff v. Encoe, 110 Nev. 1317,
885 P.2d 596 (1994) . . . . . passim

Stallman v. Youngquist, 125 Ill. 2d 267,
531 N.E.2d 355 (1988) 21, 24

State ex rel. Angela M.W. v. Kruzicki,
209 Wis. 2d 112, 561 N.W.2d 729 (1997) 19

State v. Ashley, 701 So. 2d 338 (Fla. 1997) 21

State v. Dunn, 82 Wash. App. 122,
916 P.2d 952 (1996), *review denied*, 130 Wash. 2d 1018,
928 P.2d 413 (1996) 12

State v. Gethers, 585 So. 2d 1140 (Fla. App. 1991) 13

State v. Gray, 62 Ohio St. 3d 514,
584 N.E.2d 710 (1992) 15, 16

State v. Horne, 282 S.C. 444,
319 S.E.2d 703 (1984) 6, 21

State v. Jenkins, 278 S.C. 219, 294 S.E.2d 44 (1982) ... 27

State v. Luster, 204 Ga. App. 156, 419 S.E.2d 32,
cert. denied, 1992 Ga. LEXIS 467 (Ga. June 4, 1992) .. 15

In re Valerie D., 223 Conn. 492, 613 A.2d 748 (1992) .. 19

Whitner v. State, 328 S.C. 1,
492 S.E.2d 777 (1997) ..... passim

DOCKETED CASES

Collins v. State, Mem. Op. No. 97-MO-115
(S.C. Dec. 1, 1997), *reh'g denied,* (Jan. 8, 1998) 11

Crawley v. Evatt, Mem. Op. No. 97-MO-117
(S.C. Dec. 1, 1997) 1

Ferguson, et al. v. Charleston, et al.,
CA#2:93-2624-12, Judgment (D.S.C. 1997),
appeal filed, No. 97-2512 (4th Cir.) 3

Rickman v. Evatt, Mem. Op. No. 97-MO-116
(Dec. 1, 1998), *reh'g denied*, (Jan. 8, 1998) 11

State v. Garrick, Case No. 95-GS-40-08467
(Richland Cty, Ct. Gen. Sess., Dec. 2, 1997) 11

State v. Zimmerman, No. 96-CF-525
(Wis. Cir. Ct. Racine Cty Sept. 18, 1996),

appeal filed, No. 96-2797-C.R 12

Sullivan v. State, No. 93-CP-23-3223
(S.C. Ct. C.P., Dec. 19, 1994), *petition for cert. filed*,
(Dec. 23, 1997) 11, 20

Tolliver v. State, No. 90-CP-23-5178
(S.C. Greenville Aug. 10, 1992),
cert. denied, (Mar. 10, 1993) 20

FEDERAL STATUTES

28 U.S.C. § 1257(a) 2

Child Abuse Prevention and Treatment Act of 1974
(P.L. No. 93-247) 16

Fourteenth Amendment, Section 1 to the
United States Constitution 1

STATE STATUTES

Georgia Const. Art. VI, c V, Para. III (1997) 15

KRS §§ 508.100 13

NRS § 200.508 14

S.C. Code Ann. § 20-7-30(1) 6

S.C. Code Ann. § 20-7-50 ..... passim

S.C. Code Ann. § 20-7-510(A) 11

S.C. Code Ann. § 20-7-560 11

MISCELLANEOUS

Douglas Besharov, *The Legal Aspect of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill. L. Rev. 458 (1977-78) 2, 17

John D. Elliott, *Child Protection Act of 1977 with Commentary* (March 1980) 17

Philip H. Jos, *et al., The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale* 3

Allison Marshall, 1994 Legislative Update, in *National Association for Families and Addiction Research and Education Update* (Spring 1995) 9

NAPARE Policy Statement No. 1, *Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive* (1990) 26

Michael P. Penick, *Wrongful Death of a Fetus*, 19 Am. Jur. Proof of Facts 3d 107 (1993) 16

Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Rights of Privacy*, 104 Harv. L. Rev. 1419 (1991) 2

Roberto Romero, M.D., *et al., Prenatal Diagnosis of Congenital Anomalies* (1998) 2

Settlement Agreement Between Medical Center of the Medical University of South Carolina and Office for Civil Rights, U.S. Department of Health and Human Services (Aug. 8, 1994). 3

PETITION FOR WRIT OF CERTIORARI

Cornelia Whitner and Malissa Ann Crawley respectfully submit this petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of South Carolina in *Whitner v. State*, filed on October 27, 1997, and the subsequent decision in *Crawley v. Evatt*, relying on the *Whitner* opinion.[1]

OPINION BELOW

The Supreme Court of South Carolina, on writ of certiorari, reversed the order of the Court of Common Pleas granting Ms. Whitner's Application for Post Conviction Relief. The *Whitner* decision is reported at 328 S.C. 1, 492 S.E.2d 777, and is reprinted in the Appendix hereto at 3a-27a.[2] The South Carolina Supreme Court's denial of Ms. Whitner's Petition for Rehearing (70a), and her Application to Remain on Bond are unreported (93a-95a), as is the order of the Court of Common Pleas. (64a-69a) In the wake of the *Whitner* decision, on December 1, 1997, the South Carolina Supreme Court granted the state's petition for a writ of certiorari in Ms. Crawley's case, reversed the grant of state habeas relief, denied her Petition for Rehearing, and denied her subsequent Application to Remain on Bond. (96a-97a)

STATEMENT OF JURISDICTION

The opinion of the South Carolina Supreme Court from which petitioner Whitner seeks review was issued on October

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[1] Pursuant to Rule 12.2 of the Rules of the Supreme Court of the United States, petitioners file a single petition for a writ of certiorari because the two judgments raise identical questions.

[2] For the convenience of the Court, all unpublished material is included in petitioners' Lodging and cited herein as ("L. __")

27, 1997, and became final on November 19, 1997. The opinion from which petitioner Crawley seeks review was issued on December 1, 1997, and became final on January 8, 1998. This Court granted a thirty-day extension enlarging the time in which to file the petition to March 19, 1998. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourteenth Amendment, Section 1 to the United States Constitution, and South Carolina Code Ann. § 20-7-50 ("§ 20-7-50") is set forth in the Appendix at 98a-99a. Section 20-7-50 provides:

> Any person having legal custody of a child or helpless person, who shall, without lawful excuse, refuse or neglect to provide the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.[3]

STATEMENT OF THE CASE

In 1989, two South Carolina solicitors began applying the state's child endangerment law, § 20-7-50 (98a), to pregnant

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[3] Section 20-7-50 was amended in 1993 to make a violation of the statute a felony, and to increase the maximum term of imprisonment to conform to the new classification. *See* S.C. Code Ann. § 20-7-50 (Supp. 1994). The Supreme Court of South Carolina cited the earlier version of the statute in *Whitner v. State* because Ms. Whitner was prosecuted under that version. *See Whitner v. State*, 492 S.E.2d at 778 n.1. (5a) Section 20-7-50 was amended again in 1996. S.C. Code Ann. § 20-7-50 (1997). (99a)

women whose conduct was presumed to pose a risk to fetal health. Since that time, the overwhelming majority of women arrested pursuant to this new interpretation, including petitioners Cornelia Whitner and Malissa Crawley, have been low-income, African-American women who sought health care, and who, instead of being offered treatment for their substance dependency during pregnancy, were arrested after the hospital reported their condition to the local police department.[4]

A. Cornelia Whitner

On April 7, 1992, Cornelia Whitner, a 28 year old, African-American woman, was indicted for violating § 20-7-50 by allegedly failing "to provide proper medical care for her unborn child by using crack cocaine while pregnant." Affidavit in Support of the Arrest Warrant D-038088 (Feb. 5, 1992).

At her plea hearing on April 20, 1992, Ms. Whitner's attorney stated that Ms. Whitner's son, Tevin, born February

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[4] In Charleston, for example, only pregnant women who sought treatment at the Medical University of South Carolina ("MUSC"), and were determined to have a history of cocaine use were arrested pursuant to the new interpretation of the statute. Of the women arrested under this policy, 96% are African-American. *See Ferguson, et al. v. Charleston, et al.*, CA#2:93-2624-12, Judgment (D.S.C. 1997) (L. 207-18), *appeal filed,* No. 97-2512 (4th Cir.); *see also* Philip H. Jos, *et al.*, *The Charleston Policy on Cocaine Use During Pregnancy*: A Cautionary Tale, 23 J. Law, Med. Ethics, 120, 124 (1995); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Rights of Privacy*, 104 Harv. L. Rev. 1419, 1421 n.6 (1991); *Settlement Agreement Between Medical Center of the Medical University of South Carolina and Office for Civil Rights*, U.S. Department of Health and Human Services (Aug. 8, 1994). (L. 219-24)

2, 1992, enjoyed good health, and that Ms. Whitner had received substance abuse counseling. Ms. Whitner, requesting assistance from the court, said: "I need some help, your honor." *State v. Whitner*, 92-GS-39-670, Transcript of Record at 2 (S.C. Ct. Gen. Sess. Pickens Cty Apr. 20, 1992). (51a)

Although Ms. Whitner and her attorney emphasized both the need and Ms. Whitner's desire for in-patient treatment, *id.* (55a), the court responded, "I think I'll just let her go to jail." *Id.* Ms. Whitner was then sentenced to eight years in prison. *Id.*

On May 13, 1993, after serving more than a year of her eight year sentence, Ms. Whitner filed an Application for Post-Conviction Relief ("PCR") in the Court of Common Pleas ("PCR Court"), raising both state and federal constitutional grounds for seeking relief. (57a-63a) On November 22, 1993, the PCR Court issued an order granting Ms. Whitner's application, and vacating her sentence. *Whitner v. State*, 93, CP-39-347, slip op. (S.C. Ct. C.P. Nov. 22, 1993). (64a-69a) In doing so, the PCR Court concluded that the lower court lacked subject matter jurisdiction to accept a guilty plea based on a non-existent offense. Specifically, the PCR Court found that the "plain, ordinary, and popular meaning of `a person under the age of eighteen' does not include a fetus." PCR Court Order at 3. (66a)

On July 15, 1996, the South Carolina Supreme Court, on writ of certiorari, and addressing only the state law issues, reversed the PCR Court's decision. *See* slip op. No. 24468 (S.C. Sup. Ct. July 15, 1996). (28a-49a) Thereafter, on October 27, 1997, the state high court granted Ms. Whitner's Petition for Rehearing, issued a refiled opinion addressing both state and federal claims, and reversed the PCR Court's order. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). (3a-27a) Ms. Whitner, who reported to the Leath Correctional Facility in December 1997, has now served almost two years of her eight year sentence.

B. Malissa Ann Crawley

On January 6, 1992, petitioner Malissa Ann Crawley, a 31 year old African-American woman, was indicted on a charge of child neglect based on her pregnancy and substance dependency. On the advice of her court-appointed attorney, Ms. Crawley pled guilty before the Court of General Sessions. *State v. Crawley*, 92-GS-04-01 slip op. (S.C. Ct. Gen. Sess. Jan 6, 1992). (74a-83a) The court sentenced Ms. Crawley to five years in prison, which was suspended to five years probation.

On July 15, 1994, Ms. Crawley was assaulted by her boyfriend. Although she was the victim of abuse, she was charged with Criminal Domestic Violence. Ms. Crawley, not advised of any defenses, including that of self-defense, and not understanding the ramifications of a guilty plea, pled guilty to the charge, which carried a maximum punishment of 30 days or a fine of $500. As a result, on August 5, 1994, she was found to have violated her probation, and was ordered to begin serving her previously suspended five year sentence.

A petition for a writ of habeas corpus was filed on September 25, 1994, alleging that the act to which Ms. Crawley pled guilty under § 20-7-50 is not a crime in South Carolina. (84a-85a) The court granted the requested relief, holding that "all other circuit court[s] that have addressed the issue have resolved the issue in favor of the petitioner." *Crawley v. Evatt*, 94-CP-04-1280, slip op. at 2 (Ct. C. P., Anderson Cty, S.C. Oct. 17, 1994) (87a)

Soon after her release, Ms. Crawley successfully completed a substance addiction treatment program. Since that time, Ms. Crawley has cared for her children, all of whom are healthy, has received health care training, and been employed as a home health care assistant. *See* Ms. Crawley's Application to Remain on Bond to the Supreme Court of South Carolina. (93a) However, on December 1, 1997, the South Carolina Supreme Court, ruling on the State's appeal,

reversed the grant of habeas relief, and reinstated Ms. Crawley's conviction. *Crawley v. Evatt*, Mem. Op. No. 97-MO-117 (S.C. Dec. 1, 1997). (89a-90a) The court denied her petition for rehearing on January 8, 1998. (91a-92a) Despite the positive changes in Ms. Crawley's life, the court also denied her petition to remain on bond.

On February 25, 1998, Ms. Crawley filed an application to stay the mandate of the South Carolina Supreme Court pending this Court's consideration of the petition for certiorari. The application was denied on February 27, 1998. Ms. Crawley returned to prison on March 2, 1998, compelling her to leave her young children, ages 6, 4, and 2.

C. Opinion Below

In *Whitner*, the South Carolina Supreme Court examined the scope of the state's child neglect statute, § 20-7-50, and noted that:

> Under the Children's Code, "child" means a "person under the age of eighteen." S.C. Code Ann. Sec. 20-7-30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code.

Whitner, 492 S.E.2d at 779. (7a) A three member majority of the court, in concluding that "the word `child'... includes viable fetuses," *id.* at 778 (5a), accepted the State's argument that §20-7-50 "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus." *Id.* at 779. (7a)

In reaching this conclusion, the court relied on two prior rulings in civil wrongful death cases, *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960), and *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), as well as a decision in one criminal case, *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), in which the court created, and applied prospectively, a new common law crime of "feticide." The *Whitner* court

reasoned: "[I]t would be absurd to recognize the viable fetus as a person for purpose of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse." *Id.* at 780. (9a)

The court below explicitly rejected petitioner Whitner's argument that the South Carolina Legislature could not have intended such an interpretation, because it would lead to the "absurd" result of making all activities by pregnant women potentially harmful to a fetus, unlawful neglect. The majority in *Whitner* held that it "need not address this potential parade of horribles." *Id.* (12a) Nevertheless, it specifically found that applying § 20-7-50 to other conduct by pregnant women, such as smoking cigarettes and drinking alcohol, would also be consistent with the legislative intent. *Id.* at 782. (12a)

On rehearing, the majority also rejected Ms. Whitner's federal constitutional due process notice and vagueness claims, concluding that she had adequate notice because (i) of the plain meaning of the word "child," and (ii) "it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child." *Id.* at 785. (19a)

In his dissent, Chief Justice Finney concluded that "[a] plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children and not those which may harm fetuses." *Id.* at 787. (Finney, C.J. dissenting). (23a-24a) He noted further that a prior South Carolina decision, *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995), interpreting a civil section of the Children's Code, established that the term "child" means "a child in being and not a fetus." *Id.* at 786. (23a) According to Chief Justice Finney, "[i]t would be incongruous at best to hold that the definition of `child' in the civil context of *Doe* is more restrictive than it is in the criminal context..." *Id.* Chief Justice Finney concluded his analysis by noting that "[t]he statutory requirement of legal custody is evidence of intent to extend the statute's reach only to children, because the

concept of legal custody is simply inapplicable to a fetus." *Id.* (24a)

Likewise, Justice Moore, concurring in the dissent, concluded that the majority had "invade[d] what is clearly the sole province of the legislative branch," and "embark[ed] on a course of judicial activism rejected by every other court to address the issue." *Id.* at 787. (25a) He concluded further that the majority opinion rendered the statute unconstitutionally vague because "a pregnant woman potentially [will now be] criminally liable for myriad acts which the legislature has not seen fit to criminalize." *Id.* at 788. (26a)

REASONS FOR GRANTING THE WRIT

The *Whitner* court has created an intolerable conflict among the nation's state high courts regarding the scope of the federal constitutional guarantees embodied in the Fourteenth Amendment. The high courts of Kentucky and Nevada have squarely held that the due process guarantee of notice and its prohibition against vague criminal statutes preclude the use of child neglect statutes to punish women for their conduct during pregnancy. *See Sheriff v. Encoe*, 110 Nev. 1317, 1319, 885 P.2d 596, 598 (1994); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993). These courts, as well as all other state courts, have construed these federal constitutional protections in a manner that now directly conflicts with the *Whitner* court's constitutional analysis. This Court must issue accept the petition in order to resolve this conflict, and thereby ensure a consistent, nation-wide interpretation of federal due process guarantees.

Moreover, beyond the conflict among state courts, the *Whitner* decision demonstrates that the court below has fundamentally misconstrued the constitutional principles of due process, and in so doing, has advanced an analysis that completely confounds this Court's Fourteenth Amendment jurisprudence.

Petitioners did not have notice that South Carolina's child endangerment statute would be reinterpreted to apply to their conduct during pregnancy, and neither the statutory language, its prior interpretation, nor the legislative history would have so informed them. In fact, the South Carolina Legislature (the "Legislature"), like every other state legislature that has considered expanding its child neglect statute to reach pregnant women or creating special penalties for women who become pregnant while substance addicted, deliberately chose not to do so.[5] *See Whitner*, 492 S.E.2d at 787 (Moore, A.J.

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[5] *See, e.g.*, Allison Marshall, 1994 Legislative Update, in

dissenting). (25a) Instead, the Legislature rejected these proposals, and in so doing, acknowledged the conclusion of every leading medical group, that threatening women with arrest for conduct engaged in during pregnancy will endanger both fetal and maternal health by frightening women away from prenatal and other needed care.[6]

Furthermore, § 20-7-50, as reinterpreted, is so vague that it fails to provide pregnant women and their physicians with notice as to which of the infinite number of actions taken by pregnant women will be deemed criminal and/or must be reported. In addition, because pregnant women cannot know when viability will be deemed to have occurred, they are uncertain not only as to which actions are proscribed, but also when those actions will subject them to punishment. Given the arbitrary and discriminatory enforcement extant prior to the *Whitner* decision, the decision now, by virtue of its expansion of the activities that may render one subject to prosection, will only serve to exacerbate an intolerable situation.

National Association for Families and Addiction Research and Education Update (Spring 1995).

[6] *See Johnson v. State*, 602 So. 2d 1288, 1295-96 (Fla. 1992) (holding that a state statute prohibiting the delivery of any controlled substance to a "person under the age of 18 years" did not apply to a pregnant woman who was charged with "delivering" cocaine through the umbilical cord, and finding that "[r]ather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected"); *State v. Luster*, 204 Ga. App. 156, 419 S.E.2d 32, 35 (1992), (viewing addiction during pregnancy as a disease and noting that treatment rather than prosecution is the approach "overwhelmingly in accord with the opinions of local and national medical experts"), *cert. denied*, (1992 Ga. LEXIS 467 (June 4, 1992)).

Finally, the *Whitner* decision has implications far beyond the fate of the two petitioners in this case.[7] It will hurt those women who, because of fear of arrest, may not seek the prenatal care that could significantly improve maternal and fetal health, women whose medical decisions may now be construed as endangering fetal health, and physicians and other health care professionals who are now at risk of arrest for failure to report child neglect.[8] *See* S.C. Code Ann. § 20-7-510(A).

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[7] It will affect women whose convictions either have been or are likely to be upheld based on the *Whitner* decision as well as those who are now subject to its vague proscriptions. *See, e.g., Collins v. State*, Mem. Op. No. 97-MO-115 (S.C. Dec. 1, 1997) (granting state's petition for writ of certiorari, reversing the grant of post-conviction relief, and reinstating the conviction for unlawful child neglect based on Ms. Collins' substance dependency during pregnancy), *reh'g denied,* (Jan. 8, 1998) (L. 150-52); *Rickman v. Evatt*, Mem. Op. No. 97-MO-116 (Dec. 1, 1998), *reh'g denied,* (Jan. 8, 1998) (L. 163-66); *Sullivan v. State*, No. 93-CP-23-3223, Order (Ct. C. P. Greenville Cty, S.C. Dec. 19, 1994), *petiton for cert. filed*, Dec. 23, 1997. (L. 153-57); *State v. Garrick*, Case No. 95-GS-40-08467 (Ct. Gen. Sess. Richland Cty, S.C. Dec. 2, 1997). (L. 206)

[8] Pursuant to § 20-7-560, "[a] person required to report a case of child abuse or neglect [and] who knowingly fails to do so ... is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than six months, or both."

ARGUMENT

I. BY REINTERPRETING THE WORD "CHILD," THE *WHITNER* COURT HAS ENGENDERED A CONFLICT AMONG THE NATION'S STATE HIGH COURTS REGARDING THE SCOPE OF FEDERAL DUE PROCESS GUARANTEES

From 1977 to the present, *see Reyes v. Superior Court of San Bernadino Cty*, 75 Cal. App.3d 214, 141 Cal. Rptr. 912 (4th Dist. 1977), prosecutors in more than thirty states have attempted to use existing criminal laws to punish women for their behavior during pregnancy that could be harmful to fetuses,[9] and, with the sole exception of the South Carolina Supreme Court, every state court of last resort, as well as all intermediate appellate courts[10] and numerous trial courts[11]

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[9] While many of those charged under such laws were addicted to illegal substances during pregnancy, others were charged for engaging in other conduct, such as drinking alcohol. *See, e.g., State v. Zimmerman*, No. 96-CF-525, slip op. (Cir. Ct. Racine Cty, Wis. Sept. 18, 1996), *appeal filed,* No. 96-2797-C.R. (Wis. Ct. App. Dist. II). (L. 188-205)

[10] *See, e.g., Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (Ct. App. 1995) (in dismissing child abuse charges filed against a woman for heroin use during pregnancy, court held that the ordinary meaning of "child" excludes fetuses, and to conclude otherwise, would offend due process notions of fairness and render statute impermissibly vague); *Collins v. State*, 890 S.W.2d 893 (Tex. App. El Paso 1994) (charges brought for substance abuse during pregnancy dismissed because application of the statute to prenatal conduct violates federal due process guarantees); *State v. Dunn*, 82 Wash. App. 122, 916 P.2d 952 (1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as a person under eighteen years of age"), *review denied*, 130 Wash. 2d 1018, 928 P.2d 413 (1996); *State*

reaching this issue, has rejected the use of child endangerment and other criminal statutes to punish women for their conduct during pregnancy.

The South Carolina Supreme Court's decision to expand the scope of § 20-7-50 directly conflicts with the decisions of its sister state courts. The high courts of Nevada and Kentucky expressly ruled that the use of child endangerment statutes to prosecute women for prenatal conduct violates the federal constitutional guarantee of due process. Specifically, in *Encoe*, 885 P.2d 596, and *Welch*, 864 S.W.2d 280, the supreme courts of Nevada and Kentucky each determined that their criminal child neglect statutes could not be applied to a pregnant woman's conduct because to do so would: (1) violate the plain meaning of their respective statutes; (2) deprive a woman of constitutionally mandated due process notice; and (3) render the statutes unconstitutionally vague.

As the Kentucky Supreme Court in *Welch* explained with regard to KRS §§ 508.100, 508.110, and 508.120:

> The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the danger of the road? The defense asks where do we draw the line

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v. Gethers, 585 So. 2d 1140 (Fla. App. 1991) (dismissing child abuse charges brought for prenatal drug use on ground that such application misconstrues the purpose of the law).

[11] *See* unpublished trial court decisions (L. 1-187).

> self-abuse by a pregnant woman that wantonly exposes to risk her unborn baby? The Commonwealth replies that the General Assembly probably intended to draw the line at conduct that qualifies as criminal, and then leave it to the prosecutor to decide when such conduct should be prosecuted as child abuse in addition to the crime actually committed.
>
> However, it is inflicting intentional or wanton injury upon the child that makes the conduct criminal under the child abuse statutes, not the criminality of the conduct *per se*. The Commonwealth's approach would exclude alcohol abuse, however devastating to the baby in the womb, unless the Commonwealth could prove an act of drunk driving; but it is the mother's alcoholism, not the act of driving that causes the fetal alcohol syndrome. The "case-by-case" approach suggested by the Commonwealth is so arbitrary that, if the criminal child abuse statutes are construed to support it, the statutes transgress reasonably identifiable limits; *they lack fair notice and violate constitutional due process limits against statutory vagueness*.

864 S.W.2d at 283 (emphasis added).

Similarly, in *Encoe*, the Nevada supreme court held that its child neglect statute, NRS § 200.508, did not apply to a mother's prenatal substance dependency. The *Encoe* court "recognized that due process prohibits courts from interpreting existing laws in an unforeseeable or unintended manner," and stated that such an interpretation would render the statute unconstitutionally vague. 885 P.2d at 596 ("To hold otherwise would ... open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins.").

A controlling opinion from the Michigan Court of Appeals,[12] *People v. Hardy*, 188 Mich. App. 305, 469 N.W.2d

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[12] *See Wieczorek v. Volkswagenwerk*, 731 F.2d 309, 310 (6th Cir. 1984).

50 (1991), *leave to appeal denied*, 437 Mich. 1046 (1991), *amended*, 471 N.W.2d 619 (Mich. 1991), held that the application of the state's drug delivery statute to a pregnant woman who "delivered" cocaine to her child through the umbilical cord violated the constitutional proscription that "a penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties." 188 Mich. App. at 309, 469 N.W.2d at 52. Likewise, a controlling Georgia Court of Appeals decision,[13] *State v. Luster*, 419 S.E.2d at 33, strictly construed a state statute proscribing drug delivery "from one person to another" because to do otherwise would deprive pregnant women of fair notice.

In addition, the supreme courts of Ohio and Florida construed their respective statutes in conformity with the federal due process requirement that penal statutes provide fair notice of the conduct prohibited so that citizens may conform their behavior to the dictates of the law. *See State v. Gray*, 62 Ohio St. 3d 514, 584 N.E.2d 710, 711 (1992) (child neglect statute could not be used to prosecute pregnant women for substance addiction because neither the statutory language nor the legislative history indicated its applicability to such conduct); *Johnson*, 602 So. 2d at 1290. Both the Nevada and Kentucky supreme courts noted that the *Johnson*, *Gray*, and *Hardy* rulings were mandated by federal due process principles. In this regard, the Nevada high court noted:

> Courts in other jurisdictions have also held that the respective criminal statutes did not apply to the passage of harmful substances from a mother to her child through the umbilical cord. *See, e.g., Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993); *Johnson v. State*, 602 So. 2d 1266 (Fla. 1992); *State v. Gray*, 62 Ohio St. 3d 514, 584 N.E.2d 710 (Ohio 1992); *People v. Hardy*, 188 Mich. App. 305,

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[13] *See* Georgia Const. Art. VI, c V, Para. III (1997).

> 469 N.W.2d 50 (Mich. Ct. App. 1991). These cases address statutes similar in effect to the one at issue here in Nevada. All of these courts concluded that, properly construed, the statutes involved do not intend to punish an expectant mother's drug use which is potentially injurious to her child. *Each court reasoned that such a construction renders the statute impermissibly vague.*

Encoe, 885 P.2d at 598 (emphasis added). The Kentucky supreme court used similar language. *See Welch*, 864 S.E.2d at 283 ("[A]ll of these cases point out in one way or another that to construe the statute involved otherwise makes it impermissibly vague....").

South Carolina has separated itself from all other states, not by virtue of any unique state laws, but rather by virtue of its aberrant interpretation of federal due process principles. South Carolina's protection of fetuses through tort and feticide laws addressing the conduct of third parties does not distinguish its approach from that of other states.[14] Nor does South Carolina's child neglect statute differ from that of most other states, which also employ the term "child," and were similarly guided by federal legislation intended to protect children, not fetuses.[15]

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[14] *See, e.g.*, Michael P. Penick, *Wrongful Death of a Fetus*, 19 Am. Jur. Proof of Facts 3d 107 (1993); *Jones v. Commonwealth*, 830 S.W.2d 877 (Ky. 1992) (drunk driver could be convicted of second degree manslaughter for causing injury to fetus which died after being born alive).

[15] Section 20-7-50, enacted as part of South Carolina's Child Protection Act of 1977, was intended to bring the state into compliance with the Federal Child Abuse Prevention and Treatment Act of 1974, Pub. L. 93-247, § 3, Jan. 31, 1974, 88 Stat. 5. *See* John D. Elliott, *Child Protection Act of 1977 with Commentary* (March 1980); *see also* Douglas Besharov, *The Legal Aspect of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill. L. Rev. 458, 459-61 (1977-78).

II. THE SOUTH CAROLINA SUPREME COURT MISCONSTRUED THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS NOTICE AND THUS UNFORESEEABLY EXPANDED THE STATE'S CHILD NEGLECT STATUTE

This Court has long and diligently safeguarded the basic due process principle that all criminal statutes must provide fair warning of the prohibited conduct so that no person is held criminally responsible for conduct that he or she could not reasonably understand to be proscribed. *See, e.g., United States v. Lanier*, __ U.S. __, 117 S.Ct. 1219, 1225 (1997); *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954)). As plainly stated in *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939): "[A]ll [persons] are entitled to be informed as to what the State commands or forbids."

In this case, petitioners were "given not only no `fair warning,' but *no warning whatever*," *Bouie v. Columbia*, 378 U.S. 347, 355, 84 S.Ct. 1697, 1703 (1964) (emphasis added), that, when they became pregnant while substance addicted, their circumstances would be deemed "child neglect" under § 20-7-50. Neither the plain language of the statute, prior judicial interpretation, nor the decisions from *any* court in the country could have indicated to petitioners that this statute might apply to their situation. *See id.* at 356, 84 S.Ct. at 1704. As a result, the *Whitner* decision represents a particularly deplorable violation of the well-established principles of constitutional law:

> When a[n] ... unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

Bouie, 378 U.S. at 354-552, 84 S.Ct. at 1703; *see also Lanier*, 117 S.Ct. at 1225; *Marks v. United States*, 430 U.S. 188, 191-

92, 97 S.Ct. 990, 992-93 (1977); *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199 (1973); *Rabe v. Washington*, 405 U.S. 313, 316, 92 S.Ct. 993, 995 (1972); *Palmer v. Euclid*, 402 U.S. 544, 91 S.Ct. 1563 (1971).

In *Bouie*, the Court made clear that the South Carolina Supreme Court could not re-write its criminal trespass law to punish two African-American protesters who refused to leave a segregated restaurant when asked to do so. 378 U.S. 347, 84 S.Ct. 1697 (1964). In reversing the convictions of the two student protesters, the Court stated:

> The crime for which these petitioners stand convicted was "not enumerated in the statute" at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment.

Id. at 363, 84 S.Ct. at 1707.

Here, as in *Bouie*, the crime for which petitioners were convicted was "not enumerated in the statute." 378 U.S. at 363, 84 S.Ct. at 1707. Like the trespass statute which, "[b]y its terms," did not prohibit the act of "remaining on premises after being asked to leave," *id.* at 355, 84 S.Ct. at 1703, South Carolina's child neglect statute does not, by its terms, apply to viable fetuses. *See Whitner*, 492 S.E.2d at 787 (Finney, C.J. dissenting). (23a-25a) In fact, consistent with the plain and ordinary meaning of the statutory language, the South Carolina Supreme Court, prior to its decision in *Whitner*, as well as all lower courts in the state, had interpreted this specific statute as applying only to cases involving the physical or emotional abuse of a child.

As in *Bouie*, where the state court's interpretation was "inconsistent" with the law of other states, 378 U.S. at 361, 84 S.Ct. at 1706, the *Whitner* court's interpretation of § 20-7-50 is inconsistent with its sister state courts' interpretations of

similar statutes.[16] *See* pp. 13 to 16, *supra*. In fact, petitioners, based on other state decisions that found federal constitutional violations, *see id.*, could only believe that the constitution barred the application of South Carolina's child endangerment law to their conduct during pregnancy.

Moreover, most courts, including this one, have concluded that the plain and ordinary meaning of the words "child" and "person" do *not* include the unborn. *See Burns v. Alcala*, 420 U.S. 575, 580, 95 S.Ct. 1180, 1184 (1975) ("[f]ollowing the axiom that words used in a statute are to be given their ordinary meaning," the term "dependent child," as used in the provisions of Title IV of the Social Security Act of 1935 as amended, did not include the unborn);[17] *but see Whitner*, 492 S.E.2d at 778. (5a) Indeed, lower courts in South Carolina also rejected the interpretation recently propounded by the South Carolina Supreme Court, holding that such an

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[16] *See, e.g., In re Valerie D.*, 223 Conn. 492, 515, 613 A.2d 748, 760 (1992) (rejecting application of parental termination statute to a woman who used cocaine while pregnant, concluding that "the definition of `child' as a `person under sixteen years of age' suggests a limitation of that definition to a person who has been born, since that is the ordinary beginning point of one's `age'"); *State ex rel. Angela M.W. v. Kruzicki*, 209 Wis.2d 112, 561 N.W.2d 729 (1997) (prohibiting detention of a pregnant woman under statute authorizing protective custody of a "child," as the legislature did not intend to include "fetus" within the definition of "child").

[17] *See also In re Adoption of Nelson*, 202 Kan. 663, 666, 451 P.2d 173, 176 (1969) (noting that "[we] do not ordinarily use the term child to mean an unborn child," the nine month gestation period cannot be included in computation period of a father's failure to assume parental duties).

interpretation is not consonant with the ordinary understanding of the term "child."[18]

Like *Bouie*, in which the Court considered the fact that the state's own legislature believed that its trespass statute did not cover notice after entry as evidenced by specific legislative activity on the subject, 378 U.S. at 361-62, 84 S.Ct. at 1707, the Legislature's extensive activity on the subject of substance addicted, pregnant women indicates that it also did not consider that existing laws addressed this issue. *See* 492 S.E.2d at 787 (Moore, A.J. dissenting). (25a-26a)

In support of its holding that petitioners had fair notice that their behavior constituted child endangerment pursuant to state law, the *Whitner* court relied on petitioners' presumptive knowledge of the "well documented" fact that cocaine use during pregnancy "can cause serious harm to the viable unborn child." *Whitner*, 492 S.E.2d at 782. (13a) However, absent a consensus within the medical community regarding the possible teratogenic risks of cocaine (especially as compared to the consensus on the dangers of tobacco and alcohol),[19] petitioners cannot be deemed to have received

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[18] For example, in *Tolliver v. State*, No. 90-CP-23-5178, Order at 5 (Ct. C. P. Greenville Cty, S.C. Aug. 10, 1992), *cert. denied*, (Mar. 10, 1993) (L. 171-77), the court granted post-conviction relief to a woman who pled guilty to child neglect. In doing so, the *Tolliver* court concluded that "[t]o sustain the position of the State, the word `child' used in the statute must be interpreted to include `fetus.' Such is not the plain and ordinary meaning generally given the word `child'". *See also Sullivan v. State*, No. 93-CP-23-3223, Order at 3 (Ct. C. P. Greenville Cty, S.C. Dec. 19, 1994) ("When the South Carolina legislature has meant fetus, they have used the word `fetus.' *See* S.C. Code of Laws Section 44-41-10(a), (f) and (1)"). (L. 153-57)

[19] *See Amicus Curiae* Brief of the National Association of

constitutionally sufficient notice that their conduct would be punishable under § 20-7-50.

Furthermore, petitioners cannot be charged with notice given the principle that the imposition of criminal penalties for one's status violates the Eighth Amendment to the Constitution. *See Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417 (1962) (addiction cannot be the basis for criminal prosecution under the Eighth Amendment's prohibition against cruel and unusual punishment). Similarly, petitioners could not have anticipated that they would be punished for becoming pregnant and carrying those pregnancies to term despite their addiction problems. *See Planned Parenthood v. Casey*, 505 U.S. 833, 859, 112 S.Ct. 2791, 2811 (1992) (right to privacy in reproductive decisionmaking includes a woman's decision to become pregnant and carry to term). Nor could they have known that their actions with regard to their own bodies would be treated the same as those of the strangers in *Hall*, 236 S.C. 257, 113 S.E.2d 790, *Fowler*, 244 S.C. 608, 138 S.E.2d 142, and *Horne*, 282 S.C. 444, 319 S.E.2d 703.[20] *Cf. State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (expectant mother may not be criminally charged with the death of her child resulting from self-inflicted injuries during the third trimester of pregnancy); *Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355, 359 (1988) (refusing to recognize tort of maternal prenatal negligence).

Alcoholism and Drug Abuse Counselors, *et. al.* to be filed.

[20] Nor could petitioners have known from these decisions, that South Carolina would conclude that a viable fetus is a person when this Court has rejected such broad declarations. *See, e.g., Roe v. Wade*, 410 U.S. 113, 158-162, 93 S.Ct. 705, 729-31 (1973) (finding that state wrongful death actions based on prenatal injuries are designed to vindicate parents' interests, and that fetuses are not persons).

Given this decisional authority, petitioners could not have anticipated that they would not only be punished, but, in fact, punished *more* harshly for child neglect than for other offenses such as drug possession, merely because they were pregnant and substance dependent. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1598 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that State may impose.").

III. THE SOUTH CAROLINA SUPREME COURT HAS MISCONSTRUED THE CONSTITUTIONAL PROHIBITION AGAINST VAGUE CRIMINAL STATUTES

As the courts of numerous sister states have unequivocally recognized, efforts to expand the reach of pre-existing child endangerment statutes to cover a woman's conduct during pregnancy necessarily renders these laws unconstitutionally vague. *See* pp. 13 to 16, *supra*.

This Court has long adhered to the principle that laws which are so ambiguous that a person of common understanding cannot know what conduct is forbidden are unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment. *See, e.g., Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

The Court recently reaffirmed the vitality of this principle in the criminal context in *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524, 114 S.Ct. 1747, 1754 (1994). In that case, the Court specifically noted that the due process concerns embodied in the vagueness test are twofold; the doctrine is intended to ensure that (1) citizens are given fair notice of what is prohibited so that they may conform their behavior to the dictates of the law, *Papachristou v. City of*

Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843 (1972) and (2) the discretion of law enforcement officials is limited by explicit legislative standards so as to preclude arbitrary, capricious, and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1689 (1971); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91, 86 S.Ct. 211, 213-14 (1965). As demonstrated below, § 20-7-50, construed to apply to a woman's conduct during pregnancy, is impermissibly vague because it fails both prongs of the constitutional test. *See Harriss*, 347 U.S. at 617, 74 S.Ct. at 812; *see Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-42 (1940).

The *Whitner* court's new interpretation, coupled with the plain language of the statute, promotes a construction of the statute that is so broad that a woman of ordinary intelligence must presume that her every action might fall within its proscriptions.[21] Indeed, the absence of specific parameters *alone* renders the statute constitutionally infirm, because individuals arguably covered "must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926).

Where, as here, the actual activities proscribed are so uncertainly defined, this Court has struck the offending ordinance for vagueness.[22] *See, e.g., Palmer*, 402 U.S. at 545,

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[21] Because § 20-7-50, as construed by the *Whitner* court, proscribes "no comprehensible course of conduct at all," it "may not constitutionally be applied to any set of facts." *United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 319 (1975); *see Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

[22] The court below seeks to avoid the difficulties engendered by the vague language of the statute merely by announcing that the alleged acts committed by petitioner clearly fall within the statute's proscriptions as newly interpreted. *See*

91 S.Ct. at 1564 ("suspicious person ordinance" making it unlawful to wander about the streets or be out at late or unusual hours held vague); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, (1921). In this regard, the construction of § 20-7-50 suffers from the same flaw deemed fatal by the Court in *L. Cohen Grocery*. *Id.* at 86, 41 S.Ct. at 299. In striking the statute in that case, the Court noted that the law, as worded, "forbids no specific or definite act" and "leaves open ... the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.* at 89, 41 S. Ct. at 300.

Neither the statute itself nor the recent judicial interpretation provides a road map indicating which paths are now closed to pregnant women. A woman's conduct with respect to her own body -- conduct, such as smoking, drinking or taking prescription medications, not previously subject to punishment -- may now be determined to fall within the broad and undefined prohibitions of the statute. *See, e.g., Stallman*, 12 Ill. 2d at 276-80, 331 N.E.2d at 359-61. Thus, under the new interpretation, women, for example, undergoing chemotherapy that may endanger a fetus risk arrest and prosecution for child endangerment, as do women whose jobs may pose health risks to a developing fetus, *cf. U.A.W. v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196 (1991), as well as women who refuse caesarean sections believed necessary to protect the fetus. *Cf. In re A.C.*, 573 A.2d 1235 (D.C. 1990) (*en banc*) (reversing decision ordering caesarean section performed in the name of fetal rights over the objections of woman and physician).[23] However, common experience has

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Whitner, 492 S.E.2d at 785. (19a) However, as this Court has long stressed, "[i]t is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

[23] *See also People v. Doe*, 260 Ill. App. 3d 392, 632 N.E.2d 326

not created a general understanding of the criminality of such actions. *See L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298.

Beyond the ambiguity regarding which activities will render one subject to prosecution, § 20-7-50 is unconstitutionally vague because a pregnant woman cannot ascertain at what moment the fetus becomes viable and her actions become punishable as felony child neglect. As this Court unequivocally stated in *Colautti v. Franklin*, 439 U.S. 379, 388, 99 S.Ct. 675, 682 (1979), the determination of viability is necessarily "a matter for medical judgment." *Id.* at 395-96, 99 S.Ct. at 686.

These constitutional infirmities are further exacerbated by the fact that the new construction of the statute: 1) encompasses a woman's negligent omissions, as well as her affirmative acts; 2) fails to incorporate any intent requirement; and 3) arbitrarily burdens a substantial amount of constitutionally protected conduct.

By reaching a woman's omissions as well as her commissions, the new construction of § 20-7-50 expands the scope of potential liability to the entire universe of a pregnant woman's behavior. As Justice Moore observed:

> In construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful. Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to quit smoking or drinking?

492 S.E.2d at 788 (Moore, A. J. dissenting). (26a)

(1st Dist. 1994); *In re Brown*, 228 Ill. 525, 689 N.E.2d 397 (App. Ct. 1st Dist. Dec. 1997) (overturning decision to restrain forcibly and sedate pregnant woman who refused a blood transfusion ordered to protect the fetus she carried).

Under circumstances such as these, where one may be condemned in a criminal case for the mere failure to act, the need for adequate notice is even greater than when the prohibited conduct is specifically delineated. For this reason, the Court has traditionally scrutinized laws which criminalize omissions more closely than those which penalize solely affirmative acts.[24] *See, e.g., Kolender v. Lawson*, 461 U.S. at 358-59, 103 S.Ct. at 1858-59 (invalidating on vagueness grounds a law which required persons to produce on demand "credible and reliable" identification); *Lambert v. California*, 355 U.S. 225, 229, 78 S.Ct. 240, 243 (1957). Because § 20-7-50 has been interpreted in a manner which creates the possibility of prosecution of pregnant women for their failure to act, while it concomitantly fails to delineate any parameters for liability due to non-feasance, it cannot survive scrutiny. The Court should grant the petition to remedy this constitutional error.

The uncertainty as to § 20-7-50's proscriptions is compounded by the lack of any requirement of proof of intent. In this case, no effort was made to determine if petitioners, who requested treatment for their substance addiction, took drugs with the intention of hurting their children.[25] Moreover, because the statute had been previously

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[24] "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1859 (1983) (citation omitted). Moreover, this concern has led to the invalidation of criminal statutes on their face, "even when they could conceivably have some valid application." *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1859.

[25] As the National Association on Perinatal Addiction Research and Education ("NAPARE") has stated: "These women are addicts. They do not want or intend to harm their unborn children by using drugs." NAPARE Policy Statement No. 1, *Criminalization of Prenatal Drug Use; Punitive Measures Will Be Counter-Productive*, 2 (1990) (L. 225-26); *see also*

interpreted as providing for strict criminal liability, it seems likely that there will be no such investigation in the future. *See State v. Jenkins*, 278 S.C. 219, 294 S.E.2d 44 (1982) (holding that the Legislature intended that a violation be found regardless of whether the actor violated the statute with knowledge or intent). Thus, in the absence of any intent requirement, the statute, as newly interpreted, now imposes excessive criminal penalties[26] on individuals who unwittingly engage in one of an infinite number of unspecified, albeit proscribed, behaviors.

The Court's reasoning in *Colautti*, 439 U.S. at 390, 99 S.Ct. at 683, that an unclear criminal law is void for vagueness when the statute also lacks a meaningful intent requirement, clearly applies here. In invalidating the statute in *Colautti*, the Court stated:

> This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of mens rea. (Citations omitted).

Id. at 395 n.12, 99 S.Ct. at 685 n.12. (Citation omitted).[27]

Johnson, 602 So. 2d at 1295 n.5.

[26] *See* § 20-7-50 (providing for maximum penalty of 10 years in prison). Such a lengthy sentence underscores the inappropriateness of the new interpretation. As this Court recently noted in *Staples v. United States*, 511 U.S. 600, 615, 114 S.Ct. 1793, 1802 (1994): "the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea." *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 442, n.18, 98 S.Ct. 2864, 2876 n.18 (1978).

[27] The Court has recently emphasized that strict criminal liability offenses outside the reproductive rights context are disfavored. *See, e.g., Staples*, 511 U.S. at 605, 114 S.Ct. at 1796 (penal statutes must be construed "in light of the

In addition to the above, this Court has long emphasized that the potential for "arbitrary and discriminatory enforcement" is a particular evil that vagueness review is designed to combat. *See, e.g., Papachristou*, 405 U.S. at 170, 92 S.Ct. at 847 (standardless vagrancy law "permits and encourages an arbitrary and discriminatory enforcement of the law").[28] If a statute designed to regulate conduct does not enumerate specific rules and guidelines to govern its enforcement, neither police officers nor citizens can hope to conduct themselves in a lawful manner. *See Coates v. Cincinnati*, 402 U.S. 611, 614 n.4, 91 S.Ct. 1686, 1688 n.4 (1971). Indeed, this is precisely the problem engendered by the new interpretation of § 20-7-50. When left *entirely* to the discretion of law enforcement officials, the selection of which specific prenatal actions or omissions are to be prosecuted, *see Papachristou*, 405 U.S. at 165-70, 92 S.Ct. at 845-47, invites subjective and discriminatory enforcement. *Id.* at 170, 92 S.Ct. at 847.

As the Court further elucidated in *Kolender*, the absence of legislatively determined boundaries for law enforcement creates the "potential for arbitrarily suppressing" constitutionally protected liberties. 461 U.S. at 359, 103 S.Ct. at 1859; *see also Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191 (1982). In this case, there can be no doubt that the *Whitner* decision

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background rules of the common law" under which "the requirement of some mens rea for a crime is firmly embedded"); *United States Gypsum Co.*, 438 U.S. at 437-38, 98 S.Ct. at 2873-74 (holding that intent is an element of a criminal antitrust offense).

[28] In discussing the historical treatment of this prong of the analysis, the Court stressed in *Kolender*, 461 U.S. at 357-58 n.7, 103 S.Ct. at 1858 n.7, that "concern for minimal guidelines finds its roots as far back as [this Court's] decision in *United States v. Reese*, 92 U.S. 214, 221 (1876)...."

impinges upon a constellation of fundamental rights, including the right to privacy in reproductive decisionmaking, *see, e.g., Casey*, 505 U.S. at 895-98, 112 S.Ct. 2830-31, the right to privacy of medical information, *see, e.g., Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869 (1977), the right to be free from cruel and unusual punishment, *Robinson*, 370 U.S. at 660, 82 S.Ct. at 1417, and the right to be free from laws that discriminate on the basis of gender by targeting pregnant women and new mothers for special criminal penalties. *See, e.g., United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264 (1996) (establishing the standard of review for claims of gender discrimination). While these rights are clearly implicated by the *Whitner* decision, this Court need not reach these issues in this case. *See Kolender*, 461 U.S. at 3362, 103 S.Ct. at 1860 (stating that the Court "find[s] it unnecessary to decide other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so").

The South Carolina Supreme Court, by reinterpreting the statute, has now improperly affirmed the state's unconstitutional construction of § 20-7-50, as well as sanctioned enforcement of a discriminatory policy. If left unaddressed, this new interpretation, far from resolving ambiguities, will, instead, invite similar unconstitutional applications in the future.

CONCLUSION

As evidenced by the *Whitner* decision, when intense political controversy and judicial overreaching compromise logic and undermine fundamental constitutional guarantees, the resulting legal approach is necessarily flawed. By retroactively applying a new, judicially created crime of fetal abuse, the court below "walk[ed] down a path that the law, public policy, reason and common sense forbid it to tread." *Johnson*, 602 So. 2d at 1297. In so doing, the *Whitner* court created an intolerable conflict among the nation's state high

courts, and articulated a construction of the scope of the constitutional protections embodied in the Fourteenth Amendment that is directly at odds with the decisions of this Court, as well as that of South Carolina's sister state courts. This Court must grant the petition to redress this error.

Dated: New York, New York
March 19, 1998

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APPENDIX

TABLE OF CONTENTS

APPENDIX

PAGE

Whitner v. State, Order Granting Petition for Rehearing 1a

Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (Oct. 27, 1997). 3a

Whitner v. State, Op. No. 24468, slip op. (S.C. July 15, 1996) 28a

State v. Whitner, 92-GS-39-670, Transcript of Record (Ct. Gen Sess. Pickens Cty, S.C. Apr. 20, 1992). 50a

Whitner v. State, Application for Post-Conviction Relief, 93-CP-39-347 (May 13, 1993) 57a

State v. Whitner, 93, CP-39-347, Order (Ct. C.P. Pickens Cty, S.C. Nov. 22, 1993) 64a

Letter Re: *Whitner v. State,* (Nov, 19, 1997) (denial of Petition for Rehearing) 70a

Letter Re: *Whitner v. State,* (Nov. 20, 1997) (refusing to take action on the Petition to Allow Petitioner to Remain on Bond). 72a

State v. Crawley, 92-GS-04-01, Transcript of Record (Ct. Gen. Sess. Greenville Cty, S.C. Jan. 6, 1992) 74a

Crawley v. Evatt, 94-CP-04-1280, Petition for Writ of Habeas Corpus (Sept. 25, 1994). 84a

Crawley v. Evatt, 94-CP-04-1280, slip op. (Ct. Common Pleas, Anderson Cty, S.C. Oct. 17, 1994) 86a

Crawley v. Evatt, Mem. Op. No. 97-MO-117 (S.C. Dec. 1, 1997) (Reversing grant of Habeas Corpus) 89a

Letter Re: *Crawley v. Evatt, et al.* (Jan. 8, 1998) (denying Petition for Rehearing). 91a

Crawley v. Evatt, Case No. 97-MO-117, Petition to Remain On Bond (S.C. Dec. 18, 1997), with Affidavit in support thereof from Sherman Lomax (Dec. 18, 1997). 93a

Letter Re: *Crawley v. Evatt, et. al.* 94-CP-04-1280 (Jan. 22, 1998) (denying Petition to Remain on Bond). 96a

South Carolina State Law, S.C. Code Ann. Section 20-7-50 (1985) 98a

South Carolina State Law, S.C. Code Ann. Section 20-7-50 (1997) 99a

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Cornelia Whitner, Respondent,

v.

State of South Carolina, Petitioner.

ORDER GRANTING
PETITION FOR REHEARING

In the opinion we originally issued, we declined to reach any constitutional issues, finding Whitner had not raised them to the Post Conviction Relief Court. Given the record before us then, we had no way of knowing that such issues had been raised by way of a brief to the Post Conviction Relief Court. In connection with her Petition for Rehearing, Whitner has supplemented the record, and we see that the issues were indeed raised. Whitner had the burden of providing an adequate record on appeal; given her initial failure to do so, we need not reach the constitutional issues. Nevertheless, in the interest of resolution of this case and other cases presenting similar or identical issues, we believe it prudent to address the constitutional issues Whitner presents.

Therefore, after a careful consideration of Whitner's Petition for Rehearing, it is ordered that the majority and dissenting opinions heretofore filed, Op. No. 24468, filed July 15, 1996, be withdrawn and the attached majority and

dissenting opinions be substituted. The Petition for Rehearing is granted without oral argument.

s./Ernest A. Finney, Jr. C.J.

s./Jean H. Toal A.J.

s./James E. Moore A.J.

s./John H. Waller, Jr. A.J.

s./E.C. Burnett, III A.J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cornelia Whitner, Respondent,

V.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Pickens County
Frank Eppes, Trial Judge
Larry R. Patterson,
Post-Conviction Judge

Opinion No. 24468
Heard May 31, 1995 -
Refiled October 27, 1997

REVERSED

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Attorney General Teresa Nesbitt Cosby, Staff Attorney David K. Avant, all of Columbia, for Petitioner.

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Stephen P. Williams, of Columbia, for Amici Curiae South Carolina Medical Association; American Medical Association & American College of Obstetricians & Gynecologists.

Robert H. Hood and Joseph C. Wilson, IV, both of Hood Law Firm, of Charleston, for Amici Curiae City of Charleston, South Carolina; Board of Trustees and various employees of the MUSC; Reuben Greenberg, Chief of Charleston Police Department; Charles Molony Condon, former Ninth Circuit Solicitor; and David Schwacke, current Ninth Circuit Solicitor.

Susan Dunn, of Charleston; Carol E. Tracy and Susan Frietsche, of Philadelphia, PA, for Amici Curiae The American Public Health Association; American Medical Women's Association; American Nurses Association; Coalition on Addiction, Pregnancy and Parenting; Drug Policy Foundation; National Council on Alcoholism and Drug Dependence; National Perinatal Association; Planned Parenthood of Central South Carolina; National Women's Health Network; NOW Legal Defense and Education Fund; South Carolina Chapter of The National Organization for Women; South Carolina Nurses Association; and The Women's Law Project and Operation PAR.

John D. (Jay) Elliott, of Columbia, for Amicus Curiae The Alliance for South Carolina's Children.

TOAL, A.J.: This case concerns the scope of the child abuse and endangerment statute in the South Carolina Children's

Code (the Code), S.C. Code Ann. § 20-7-50 (1985).[1] We hold the word "child" as used in that statute includes viable fetuses.

FACTS

On April 20, 1992, Cornelia Whitner (Whitner) pled guilty to criminal child neglect, S.C. Code Ann. § 20-7-50 (1985), for causing her baby to be born with cocaine metabolites in its system by reason of Whitner's ingestion of crack cocaine during the third trimester of her pregnancy. The circuit court judge sentenced Whitner to eight years in prison. Whitner did not appeal her conviction.

Thereafter, Whitner filed a petition for Post Conviction Relief (PCR), pleading the circuit court's lack of subject matter jurisdiction to accept her guilty plea as well as ineffective assistance of counsel. Her claim of ineffective assistance of counsel was based upon her lawyer's failure to advise her the statute under which she was being prosecuted might not apply to prenatal drug use. The petition was granted on both grounds. The State appeals.

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[1] Section 20-7-50 was amended in 1993 to make violation of the section a felony and to make the maximum term of imprisonment conform to the new crime classification system. See S.C. Code Ann. § 20-7-50 (Supp. 1994). We cite the earlier version of the statute in this opinion because Whitner was prosecuted under that version. The language in the amended section relating to the actions constituting the crime is identical to the language under which Whitner was prosecuted. In other words, although the characterization of and penalty for the crime have changed, the acts constituting the crime have not.

LAW\ANALYSIS

A. Subject Matter Jurisdiction

The State first argues the PCR court erred in finding the sentencing circuit court lacked subject matter jurisdiction to accept Whitner's guilty plea. We agree.

Under South Carolina law, a circuit court lacks subject matter jurisdiction to accept a guilty plea to a nonexistent offense. See *Williams v. State*, 306 S.C. 89, 410 S.E.2d 563 (1991). For the sentencing court to have had subject matter jurisdiction to accept Whitner's plea, criminal child neglect under section 20-7-50 would have to include an expectant mother's use of crack cocaine after the fetus is viable.[2] All other issues are ancillary to this jurisdictional issue.

S.C. Code Ann. § 20-7-50 (1985) provides:

> Any person having the legal custody of any *child* or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such *child*

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[2] The State argues we need not reach the issue of the applicability of section 20-7-50 to viable fetuses, because the indictment alleged a violation on the date of the child's birth. We disagree. The basis for the indictment was the presence of cocaine in the newborn infant. Unless Whitner gave her child cocaine after the child's birth, which no one has alleged, the behavior giving rise to the abuse and neglect charge necessarily occurred before the child was born. Moreover, the record of Whitner's original hearing and the hearing on her petition for Post Conviction Relief make clear the conviction was for her neglecting her child by ingesting crack cocaine during pregnancy. For that reason, we must determine whether section 20-7-50 applies to such behavior.

> or helpless person, so that the life, health or comfort of such *child* or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court. (emphasis added).

The State contends this section encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*.

Under the Children's Code, "child" means a "person under the age of eighteen." S.C. Code Ann. § 20-7-30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code.

In interpreting a statute, this Court's primary function is to ascertain the intent of the legislature. *E.g., State v. Ramsey,* 311 S.C. 555, 430 S.E.2d 511 (1993). Of course, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *E.g., State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, however, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *E.g., South Carolina Coastal Council v. South Carolina State Ethics Comm'n,* 306 S.C. 41, 410 S.E.2d 245 (1991). Finally, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. *See Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760 (1993); 82 C.J.S. *Statutes* § 316, at 541-42 (1953).

South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges. In 1960, this Court decided *Hall v. Murphy,* 236 S.C. 257, 113 S.E.2d 790 (1960). That case concerned the application of South Carolina's wrongful death statute to an infant who died

four hours after her birth as a result of injuries sustained prenatally during viability. The Appellants argued that a viable fetus was not a person within the purview of the wrongful death statute, because, *inter alia,* a fetus is thought to have no separate being apart from the mother.

We found such a reason for exclusion from recovery "unsound, illogical and unjust," and concluded there was "no medical or other basis" for the "assumed identity" of mother and viable unborn child. *Id.* at 262, 113 S.E.2d at 793. In light of that conclusion, this Court unanimously held: "We have no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother *is a person.*" *Id.* at 263, 113 S.E.2d at 793 (emphasis added).

Four years later, in *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), we interpreted Hall as supporting a finding that a viable fetus injured while still in the womb need not be born alive for another to maintain an action for the wrongful death of the fetus.

> Since a viable child is a *person before separation from the body of its mother* and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an 'act, neglect or default' by the defendant' to the injury of the child . . .
>
> *Once the concept of the unborn, viable child as a person* is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury.

Id. at 613, 138 S.E.2d at 44 (emphasis added). *Fowler* makes particularly clear that *Hall* rested on the concept of the viable fetus as a person vested with legal rights.

More recently, we held the word "person" as used in a *criminal* statute includes viable fetuses. *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984), concerned South Carolina's murder statute, S.C. Code Ann. § 16-3-10 (1976). The defendant in that case stabbed his wife, who was nine months' pregnant, in the neck, arms, and abdomen. Although doctors performed an emergency Caesarean section to deliver the child, the child died while still in the womb. The defendant was convicted of voluntary manslaughter and appealed his conviction on the ground South Carolina did not recognize the crime of feticide.

This Court disagreed. In a unanimous decision, we held it would be "grossly inconsistent . . . to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.* at 447, 319 S.E.2d at 704 (citing *Fowler v. Woodward, supra*). Accordingly, the Court recognized the crime of feticide with respect to viable fetuses.

Similarly, we do not see any rational basis for finding a viable fetus is not a "person" in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word "person" in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.

The policies enunciated in the Children's Code also support our plain meaning reading of "person." S.C. Code Ann. § 20-7-20(C) (1985), which describes South Carolina's policy concerning children, expressly states: "It shall be the policy of this State to concentrate on the *prevention of children's problems* as the most important strategy which can

be planned and implemented on behalf of children and their families." (emphasis added). The abuse or neglect of a child at *any* time during childhood can exact a profound toll on the child herself as well as on society as a whole. However, the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth. This policy of prevention supports a reading of the word "person" to include viable fetuses. Furthermore, the scope of the Children's Code is quite broad. It applies "to *all* children who have need of services." S.C. Code Ann. § 20-7-20(B) (1985) (emphasis added). When coupled with the comprehensive remedial purposes of the Code, this language supports the inference that the legislature intended to include viable fetuses within the scope of the Code's protection.

Whitner advances several arguments against an interpretation of "person" as used in the Children's Code to include viable fetuses. We shall address each of Whitner's major arguments in turn.

Whitner's first argument concerns the number of bills introduced in the South Carolina General Assembly in the past five years addressing substance abuse by pregnant women. Some of these bills would have criminalized substance abuse by pregnant women;[3] others would have addressed the issue through mandatory reporting, treatment, or intervention by social service agencies.[4] Whitner suggests

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[3] *See, e.g.*, S. 4032 (1993)(proposing making it a crime for a pregnant woman to ingest a controlled substance); H. 4486 (1994) (proposing amendment to section 20-7-50 to apply to actions of pregnant women).

[4] *See* S.1495 (1989-1990), reintroduced as S.75 (1990-1991) (requiring drug testing of newborns and to include within civil definition of neglect any newborn testing positive for

that the introduction of several bills touching the specific issue at hand evinces a belief by legislators that prior legislation had not addressed the issue. Whitner argues the introduction of the bills proves that section 20-7-50 was not intended to encompass abuse or neglect of a viable fetus.

We disagree with Whitner's conclusion about the significance of the proposed legislation. Generally, the legislature's subsequent acts "cast no light on the intent of the legislature which enacted the statute being construed." *Home Health Servs., Inc. v. DHEC*, 298 S.C. 258, 262 n.1, 379 S.E.2d 734, 736 n.1 (Ct. App. 1989) (citations omitted). Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent. *E.g., State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). Here, we see no reason to look beyond the statutory language. *See Timmons v. South Carolina Tricentennial Comm'n, supra* (where statute's meaning can be determined from its language, no need to look beyond such

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controlled substance); S.1470 (1989-1990), reintroduced as S.79 (1991) (mandating reporting to DSS pregnant woman believed to have used controlled substance; providing for education and drug treatment); H. 3858 (1990-1991)(requiring reporting of pregnant woman believed to be using controlled substance and expanding civil definition of "abused child" to include newborn testing positive for illegal drugs); S. 986 (1991)(mandating drug testing on newborn infants, requiring reporting such infants as abused under civil abuse laws, and requiring reversible sterilization or implantation of birth control until mother completes drug treatment program); S. 155 (1992-1994) (permitting testing newborns for controlled substances and reporting such test results to DSS for limited purposes); S. 1256 (1992), reintroduced as S. 150 (1992-1993) (permitting referral to DHEC of families with children prenatally exposed to drugs and giving pregnant women priority in drug treatment programs).

language). Additionally, our existing case law strongly supports our conclusion about the meaning of the statute's language.

Whitner also argues an interpretation of the statute that includes viable fetuses would lead to absurd results obviously not intended by the legislature. Specifically, she claims if we interpret "child" to include viable fetuses, *every* action by a pregnant woman that endangers or is likely to endanger a fetus, whether otherwise legal or illegal, would constitute unlawful neglect under the statute. For example, a woman might be prosecuted under section 20-7-50 for smoking or drinking during pregnancy. Whitner asserts these "absurd" results could not have been intended by the legislature and, therefore, the statute should not be construed to include viable fetuses.

We disagree for a number of reasons. First, the same arguments against the statute can be made whether or not the child has been born. After the birth of a child, a parent can be prosecuted under section 20-7-50 for an action that is likely to endanger the child without regard to whether the action is illegal in itself. For example, a parent who drinks excessively could, under certain circumstances, be guilty of child neglect or endangerment even though the underlying act -- consuming alcoholic beverages -- is itself legal. Obviously, the legislature did not think it "absurd" to allow prosecution of parents for such otherwise legal acts when the acts actually or potentially endanger the "life, health or comfort" of the parents' born children. We see no reason such a result should be rendered absurd by the mere fact the child at issue is a viable fetus.

Moreover, we need not address this potential parade of horribles advanced by Whitner. In *this* case, which is the only case we are called upon to decide here, certain facts are clear. Whitner admits to having ingested crack cocaine during the third trimester of her pregnancy, which caused her child

to be born with cocaine in its system. Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child. *See, e.g.,* Joseph J. Volpe, M.D., *Effect of Cocaine Use on the Fetus,* 327 NEW ENG. J. MED. 399 (1992); Ira J. Chasnoff, M.D., et al., *Cocaine Use in Pregnancy,* 313 NEW ENG. J. MED. 666 (1985). There can be no question here Whitner endangered the life, health, and comfort of her child. We need not decide any cases other than the one before us.

We are well aware of the many decisions from other states' courts throughout the country holding maternal conduct before the birth of the child does not give rise to criminal prosecution under state child abuse/endangerment or drug distribution statutes. *See, e.g., Johnson v. State,* 602 So. 2d 1288 (Fla. 1992); *Commonwealth v. Welch,* 864 S.W.2d 280 (Ky. 1993); *State v. Gray,* 584 N.E.2d 710 (Ohio 1992); *Reyes v. Superior Court,* 75 Cal. App. 3d 214 (1977); *State v. Carter,* 602 So. 2d 995 (Fla. Ct. App. 1992); *State v. Gethers,* 585 So. 2d 1140 (Fla. Ct. App. 1991); *State v. Luster,* 419 S.E.2d 32 (Ga. Ct. App. 1992), *cert. denied* (Ga. 1992); *Commonwealth v. Pellegrini,* No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990); *People v. Hardy,* 469 N.W.2d 50 (Mich. Ct. App.), *app. denied,* 471 N.W.2d 619 (Mich. 1991); *Commonwealth v. Kemp,* 643 A.2d 705 (Pa. Super. Ct. 1994). Many of these cases were prosecuted under statutes forbidding delivery or distribution of illicit substances and depended on statutory construction of the terms "delivery" and "distribution." *See, e.g., Johnson v. State, supra*; *State v. Luster, supra*; *People v. Hardy, supra.* Obviously, such cases are inapplicable to the present situation. The cases concerning child endangerment statutes or construing the terms "child" and "person" are also distinguishable, because the states in which these cases were decided have entirely different bodies of case law from South Carolina. For example, in *Commonwealth v. Welch,* the Kentucky Supreme Court specifically noted Kentucky law has

not construed the word "person" in the criminal homicide statute to include a fetus (viable or not). *Welch,* 864 S.W.2d at 281. In *Reyes v. Superior Court,* the California Court of Appeals noted California law did not recognize a fetus as a "human being" within the purview of the state murder and manslaughter statutes, and that it was thus improper to find the fetus was a "child" for purposes of the felonious child endangerment statute. *Reyes,* 75 Cal. App. 3d at 217.

Massachusetts, however, has a body of case law substantially similar to South Carolina's, yet a Massachusetts trial court has held that a mother pregnant with a viable fetus is not criminally liable for transmission of cocaine to the fetus. *See Commonwealth v. Pellegrini,* No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990).[5] Specifically, Massachusetts law allows wrongful death actions on behalf of viable fetuses injured *in utero* who are not subsequently born alive. *Mone v. Greyhound Lines, Inc.,* 331 N.E.2d 916 (Mass. 1975). Similarly, Massachusetts law permits homicide prosecutions of third parties who kill viable fetuses. *See Commonwealth v. Cass,* 467 N.E.2d 1324 (Mass. 1984)(ruling a viable fetus is a person for purposes of vehicular homicide statute); *Commonwealth v. Lawrence,* 536 N.E.2d 571 (Mass. 1989)(viable fetus is a person for purposes of common law crime of murder). Because of the similarity of the case law in Massachusetts to ours, the *Pellegrini* decision merits examination.

In *Pellegrini,* the Massachusetts Superior Court found that state's distribution statute does not apply to the distribution of an illegal substance to a viable fetus. The statute at issue forbade distribution of cocaine to persons under the age of eighteen. Rather than construing the word

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[5] We note that *Pellegrini* was decided by a Massachusetts superior court. To date, no appellate court in Massachusetts has addressed this issue directly.

"distribution," however, the superior court found that a viable fetus is not a "person under the age of eighteen" within the meaning of the statute. *Pellegrini,* slip op. at 11. In so finding, the court had to distinguish *Lawrence* and *Cass, supra,* both of which held viable fetuses are "persons" for purposes of criminal laws in Massachusetts.

The Massachusetts trial court found *Lawrence* and *Cass* "accord legal rights to the unborn only where the mother's or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated." *Pellegrini,* slip op. at 11. In other words, a viable fetus should only be accorded the rights of a person for the sake of its mother or both its parents. Under this rationale, the viable fetus lacks rights of its own that deserve vindication. Whitner suggests we should interpret our decisions in *Hall, Fowler,* and *Home* to accord rights to the viable fetus only when doing so protects the special parent-child relationship rather than any individual rights of the fetus or any State interest in potential life. We do not think *Hall, Fowler,* and *Horne* can be interpreted so narrowly.

If the *Pellegrini* decision accurately characterizes the rationale underlying *Mone, Lawrence,* and *Cass,* then the reasoning of those cases differs substantially from our reasoning in *Hall, Fowler,* and *Horne, supra.* First, *Hall, Fowler,* and *Horne* were decided primarily on the basis of the meaning of "person" as understood in the light of existing medical knowledge, rather than based on any policy of protecting the relationship between mother and child. As a homicide case, *Horne* also rested on the *State's* -- not the mother's -- interest in vindicating the life of the viable fetus. Moreover, the United States Supreme Court has repeatedly held that the states have a compelling interest in the life of a viable fetus. See *Roe v. Wade,* 410 U.S. 113, 165, 93 S. Ct. 705, 732, 35 L. Ed. 2d 147, 183 (1973); see also *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Webster v. Reproductive Health Servs.,* 492 U.S.

490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). If, as Whitner suggests we should, we read *Horne* only as a vindication of the mother's interest in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same aces. We decline to read *Horne* in a way that insulates the mother from all culpability for harm to her viable child. Because the rationale underlying our body of law -- protection of the viable fetus -- is radically different from that underlying the law of Massachusetts, we decline to follow the decision of the Massachusetts Superior Court in *Pellegrini.*

The dissent contends that our holding in this case is inconsistent with *Doe v. Clark,* 318 S.C. 274, 457 S.E.2d 336 (1995). Specifically, it suggests that *Doe v. Clark,* in which we construed another provision of the Children's Code, stands for the proposition that the definition of "child" in S.C. Code Ann. § 20-7-50 (1985) means a "child in being and not a fetus." Contrary to the dissent's characterization of that case, *Doe* turned on the specific language in the consent provisions of the Adoption Act, S.C. Code Ann. §§ 20-71690 and - 1700 (Law. Co-op Supp. 1994).

In *Doe,* Wylanda Clark, who was pregnant, signed a consent form allowing the Does to adopt the child upon its birth. After the child was born, Clark decided she wanted to keep the baby and attempted to argue that the consent she executed was void because it did not contain certain information required by statute. The trial judge held Clark's consent was valid. Clark appealed.

On appeal, we reversed the trial court. However, the basis for our reversal was not that "child" as defined in the Children's Code only includes born children, but that the adoption statutes contemplate that the natural mother's consent to the adoption must be given after the birth of the child to be adopted. *Doe,* 318 S.C. at 276, 457 S.E.2d at 337.

Specifically, section 20-7-1700(A)(3) requires the consent form to contain the race, sex, and *date of birth* of the adoptee, as well as any names by which the adoptee has been known. Clearly, the date of birth requirement could not be fulfilled until after the birth of the child. Furthermore, section 20-7-1690, which specifies who must consent to an adoption, provides that consent is required of "the mother of a child *born* when the mother was not married." (emphasis added). Citing these sections as well as the Children's Code's definition of child, we concluded that a natural mother cannot consent to adoption until after the birth of her child. *Id.* We did *not* hold that the term "child" excludes viable fetuses, nor do we think our holding in *Doe* can be read so broadly.

Finally, the dissent implies that we have ignored the rule of lenity requiring us to resolve any ambiguities in a criminal statute in favor of the defendant The dissent argues that "[a]t most, the majority only suggests that the term 'child' as used in § 20-7-50 is ambiguous," and that the ambiguity "is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance on decisions in two different fields of the law, civil wrongful death and common law feticide."

Plainly, the dissent misunderstands our opinion. First, we do not believe the statute is ambiguous and, therefore, the rule of lenity does not apply. Furthermore, our interpretation of the statute is based primarily on the plain meaning of the word "person" as contained *in the statute.* We need not go beyond that language. However, because our prior decisions in *Murphy, Fowler,* and *Horne* support our reading of the statute, we have discussed the rationale underlying those holdings. We conclude that both statutory language and case law compel the conclusion we reach. We see no ambiguity.

B. Ineffective Assistance of Counsel

The State next argues the PCR court erred in holding Whitner received ineffective assistance of counsel. We agree.

To prove ineffective assistance of counsel, a PCR applicant must show (1) deficient performance by her attorney and (2) prejudice resulting therefrom. *Strickland v. Washington,* 466 U.S. 668, 104 S. CL 2052, 80 L. Ed. 2d 674 (1984). To prove prejudice when challenging a guilty plea, the applicant must show that but for counsel's deficient performance, the applicant would not have pled guilty. *Hill v. Lockhart,* 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985). In this case, the basis for the ineffective assistance claim was the failure of Whitner's counsel to inform her section 20-7-50 did not apply to prenatal drug use. Whitner contends she would not have pled guilty if her lawyer had given her such advice.

Given our holding that section 20-7-50 *is* applicable to an expectant mother's illegal drug use after the fetus is viable, we cannot say Whitner's lawyer's failure to advise her of the statute's *inapplicability* constituted deficient performance. In fact, both the unambiguous language of the statute and this Court's prior case law justify counsel's belief the child neglect statute applied to Whitner's actions. Therefore, the PCR court erred in ruling Whitner received ineffective assistance of counsel.

C. Constitutional Issues

1. Fair Notice/Vagueness

Whitner argues that section 20-7-50 does not give her fair notice that her behavior is proscribed.[6] We disagree.

The statute forbids any person having legal custody of a child from refusing or neglecting to provide proper care and attention to the child so that the life, health, or comfort of the child is endangered or is likely to be endangered. As we have found above, the *plain* meaning of "child" as used in this statute includes a viable fetus. Furthermore, it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20-7-50. Whitner had all the notice the Constitution requires.

2. Right to Privacy

Whitner argues that prosecuting her for using crack cocaine after her fetus attains viability unconstitutionally burdens her right of privacy, or, more specifically, her right to carry her pregnancy to term. We disagree.

Whitner argues that section 20-7-50 burdens her right of privacy, a right long recognized by the United States Supreme Court. *See, e.g., Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Skinner v. Oklahoma,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). She

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[6] In a related argument, Whitner suggests section 20-7-50 is void for vagueness. This argument lacks merit. As we noted in our interpretation of section 20-7-50, *supra,* the same argument could be made about the statute as applied to a child who has already been born.

cites *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974), as standing for the proposition that the Constitution protects women from measures penalizing them for choosing to carry their pregnancies to term.

In *LaFleur,* two junior high school teachers challenged their school systems' maternity leave policies. The policies required "every pregnant school teacher to take maternity leave without pay, beginning [four or] five months before the expected birth of her child." *Id.* at 634, 94 S. Ct. at 794, 39 L. Ed. 2d at 57. A teacher on maternity leave could not return to work "until the beginning of the next regular school semester which follows the date when her child attains the age of three months." *Id.* at 634-35, 94 S. Ct. at 794, 39 L. Ed. 2d at 57. The two teachers, both of whom had become pregnant and were required against their wills to comply with the school systems' policies, argued that the policies were unconstitutional.

The United States Supreme Court agreed. It found that "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." *Id.* at 640, 94 S. Ct. at 796, 39 L. Ed. 2d at 60. The Court then scrutinized[7] the policies to determine whether "the interests advanced in support of" the policy could "justify the particular procedures [the School Boards] ha[d] adopted." *Id.* at 640, 94 S. Ct. at 796, 39 L. Ed. 2d at 60. Although it found that the purported justification for the policy -- continuity of instruction -- was a "significant and legitimate educational goal," the Court concluded that the "absolute requirement[] of termination at the end of the fourth or fifth month of pregnancy" was not a rational means

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[7] The Court applied a rational relationship test, the least rigorous form of scrutiny.

for achieving continuity of instruction and that such a requirement "may serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote." *Id.* at 642-43, 94 S. Ct. at 797-98, 39 L. Ed. 2d at 61-62. Finding no rational relationship between the purpose of the maternity leave policy and the means crafted to achieve that end, the Court concluded the policy violated the Due Process Clause of the Fourteenth Amendment.

Whitner argues that the alleged violation here is far more egregious than that in *LaFleur.* She first suggests that imprisonment is a far greater burden on her exercise of her freedom to carry the fetus to term than was the unpaid maternity leave in *LaFleur.* Although she is, of course, correct that imprisonment is more severe than unpaid maternity leave, Whitner misapprehends the fundamentally different nature of her own interests and those of the government in this case as compared to those at issue in *LaFleur.*

First, the State's interest in protecting the life and health of the viable fetus is not merely legitimate. It is compelling. See, e.g., *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). The United States Supreme Court in *Casey* recognized that the State possesses a profound interest in the potential life of the fetus, not only after the fetus is viable, but *throughout* the expectant mother's pregnancy. See *Casey,* 505 U.S. at 877, 112 S. Ct. at 2821, 120 L. Ed. 2d at 716 (plurality opinion).

Even more importantly, however, we do not think any fundamental right of Whitner's -- or any right at all, for that matter -- is implicated under the present scenario. It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of

crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

Moreover, as a practical matter, we do not see how our interpretation of section 20-7-50 imposes a burden on Whitner's right to carry her child to term. In *LaFleur,* the Supreme Court found that the mandatory maternity leave policies burdened women's rights to carry their pregnancies to term because the policies prevented pregnant teachers from exercising a freedom they would have enjoyed but for their pregnancies. In contrast, during her pregnancy after the fetus attained viability, Whitner enjoyed the same freedom to use cocaine that she enjoyed earlier in and predating her pregnancy -- none whatsoever. Simply put, South Carolina's child abuse and endangerment statute as applied to this case does not restrict Whitner's freedom in any way that it was not already restricted. The State's imposition of an additional penalty when a pregnant woman with a viable fetus engages in the already proscribed behavior does not burden a woman's right to carry her pregnancy to term; rather, the additional penalty simply recognizes that a third party (the viable fetus or newborn child) is harmed by the behavior.

Section 20-7-50 does not burden Whitner's right to carry her pregnancy to term or any other privacy right. Accordingly, we find no violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the PCR Court is **REVERSED**.

WALLER and BURNETT, JJ concur. FINNEY, C.J., and MOORE, A.J., dissenting in separate opinions.

FINNEY, C.J.: I respectfully dissent, and would affirm the grant of post-conviction relief to respondent Whitner.

The issue before the Court is whether a fetus is a "child" within the meaning of S.C. Code Ann. § 20-7-50 (1985), a statute which makes it a misdemeanor[1] for a "person having legal custody of any child or helpless person" to unlawfully neglect that child or helpless person. Since this is a penal statute, it is strictly construed against the State and in favor of respondent. *State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660 (1991).

The term child for purposes of §20-7-50 is defined as a "person under the age of eighteen" unless a different meaning is required by the circumstances. S.C. Code Ann. § 20-7-30 (1) (1985). We have already held that this same definition found in another part of the Children's Code means a child in being and not a fetus. *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995). It would be incongruous at best to hold the definition of "child" in the civil context of *Doe* is more restrictive than it is in the criminal context we consider today.

More importantly, it is apparent from a reading of the entire statute that the word child in § 20-7-50 means a child in being and not a fetus. *See Jackson v. Charleston County School District,* 316 S.C. 177, 447 S.E.2d 859 (1994) (when construing a statute, we do not view its terms in isolation, but rather in the context of the entire statute and its intended

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[1] After this case arose, the statute was amended to change the classification from misdemeanor to felony. 1993 Act No. 184, § 55 (effective January 1, 1994).

purpose). A plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children, and not those which may harm fetuses. First, § 20-7-50 does not impose criminal liability on every person who neglects a child, but only on a person having legal custody of that child. The statutory requirement of legal custody is evidence of intent to extend the statute's reach only to children, because the concept of legal custody is simply inapplicable to a fetus. *See Stone v. State,* 313 S.C. 533, 443 S.E.2d 544 (1994)(statutes are construed so as to avoid absurd results). Second, § 20-7-50 refers to S. C. Code Ann. § 20-7-490 (1985 and Supp. 1994) for the definition of neglect. Section 20-7-490 defines a neglected child as one harmed or threatened with harm, and further defines harm. § 20-7-490(B), (C), and (D). The vast majority of acts which constitute statutory harm under §20-7-490 are acts which can only be directed against a child, and not towards a fetus.[2] The reliance upon § 20-7-490 in § 20-7-50 is further evidence that the term child as used in the child neglect statute does not encompass a fetus. Read in context, and in light of the statutory purpose of protecting persons of tender years[3] it is clear that "child" as used in § 20-7-50 means a child in being. *Jackson v. Charleston County School District, supra.*

At most, the majority only suggests that the term "child" as used in §20-7-50 is ambiguous. This suggestion of ambiguity is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance

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[2] Examples include condoning delinquency, using excessive corporal punishment, committing sexual offenses against the child, and depriving her of adequate food, clothing, shelter or education.

[3] *State v. Jenkins,* 278 S.C. 219, 294 S.E.2d 44 (1982)(construing § 16-3-1030, recodified as § 20-7-50).

on decisions in two different fields of the law, civil wrongful death and common law feticide. Here, we deal with the Children's Code, and the meaning of language used in a criminal statute under that Code. We have already indicated that a child within the meaning of §20-7-90(A)(1985), which criminalizes non-support, must be one already born. *State v. Montgomery,* 246 S.C. 545, 144 S.E.2d 797 (1965)(indictment for violation of predecessor of § 20-7-90(A) fatally defective for failing to identify the child by description or date of birth); *see also Doe v. Clark, supra.* Even if these wrongful death, common law, and Children's Code decisions are sufficient to render the term child in § 20-7-50 ambiguous, it is axiomatic that the ambiguity must be resolved in respondent's favor. *State v. Blackmon, supra.*

I would affirm.

MOORE, A.J.: I concur with the dissent in this case but write separately to express my concerns with today's decision.

In my view, the repeated failure of the legislature to pass proposed bills addressing the problem of drug use during pregnancy is evidence the child abuse and neglect statute is not intended to apply in this instance. This Court should not invade what is clearly the sole province of the legislative branch. At the very least, the legislature's failed attempts to enact a statute regulating a pregnant woman's conduct indicate the complexity of this issue. While the majority opinion is perhaps an argument for what the law *should* be, it is for the General Assembly, and not this Court, to make that determination by means of a clearly drawn statute. With today's decision, the majority not only ignores legislative intent but embarks on a course of judicial activism rejected by every other court to address the issue.

As discussed in the Chief Justice's dissent, we are bound by the rules of statutory construction to strictly

construe a criminal statute in favor of the defendant and resolve any ambiguity in her favor. *State v. Blackmon, supra.* I cannot accept the majority's assertion that the child abuse and neglect statute unambiguously includes a "viable fetus." If that is the case, then why is the majority compelled to go to such great lengths to ascertain that a "viable fetus" is a "child?"

Contrary to the majority's strained analysis in this case, one need look no further than the language of § 20-7-50 to clearly discern legislative intent that the statute apply only to children in being. "Legal custody" is not a qualification applicable to a viable fetus. I simply disagree the legislature intended a statute entitled "Unlawful neglect of child or helpless person by legal custodian" to render a pregnant woman criminally liable for any type of conduct potentially harmful to the unborn fetus.

In construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful. Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to quit smoking or drinking? Although the majority dismisses this issue as not before it, the impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize. To ignore this "down-the-road" consequence in a case of this import is unrealistic. The majority insists that parents may already be held liable for drinking after a child is born. This is untrue, however, without some further act on the part of the parent. A parent who drinks and then hits her child or fails to come home may be guilty of criminal neglect. The mere fact of drinking, however, does not constitute neglect of a child in being.

The majority attempts to support an over inclusive construction of the child abuse and neglect statute by citing

other legal protections extended equally to a viable fetus and a child in being. The only law, however, that specifically regulates the conduct of a mother toward her unborn child is our abortion statute under which a viable fetus is in fact treated differently from a child in being.[1]

The majority argues for equal treatment of viable fetuses and children, yet its construction of the statute resuits in even greater inequities. If the statute applies only when a fetus is "viable," a pregnant woman can use cocaine for the first twenty-four weeks[2] of her pregnancy, the most dangerous period for the fetus, and be immune from prosecution under the statute so long as she quits drug use before the fetus becomes viable. Further, a pregnant woman now faces up to ten years in prison for investing drugs during pregnancy but can have an illegal abortion and receive only two-year sentence for killing her viable fetus.[3]

Because I disagree with the conclusion § 20-7-50 includes a viable fetus, I would affirm the grant of post-conviction relief.

[1] A woman may have a legal abortion of a viable fetus if necessary to preserve her health, S.C. Code Ann. § 44-41-20(c) (1985), while, of course, she may not justify the death of a child in being on this ground.

[2] Viability is presumed to occur no sooner than the twenty-fourth week of pregnancy. S.C. Code Ann. § 44-41-10(l) (1985).

[3] S.C. Code Ann. § 44-41-80(b) (1985).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cornelia Whitner, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Pickens County
Frank Eppes, Trial Judge
Larry R. Patterson,
Post-Conviction Judge

Opinion No. 24468
Heard May 31, 1996 - Filed July 15, 1996

REVERSED

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Attorney General Teresa Nesbitt Cosby, Staff Attorney David K. Avant, all of Columbia, for Petitioner.

C. Rauch Wise, of Wise & Tunstall, of Greenwood; Lynn M. Paltrow and Lisa S. Tankoos, both of The Center for Reproductive Law & Policy, of New York, for Respondent.

Stephen P. Williams, of Columbia, for Amici Curiae South Carolina Medical Association; American Medical Association & American College of Obstetricians & Gynecologists.

Robert H. Hood and Joseph C. Wilson, IV, both of Hood Law Firm, of Charleston, for Amici Curiae City of Charleston, South Carolina; Board of Trustees and various employees of the MUSC; Reuben Greenberg, Chief of Charleston Police Department; Charles Molony Condon, former Ninth Circuit Solicitor; and David Schwacke, current Ninth Circuit Solicitor.

Susan Dunn, of Charleston; Carol E. Tracy and Susan Frietsche, of Philadelphia, PA, for Amici Curiae The American Public Health Association; American Medical Women's Association; American Nurses Association; Coalition on Addiction, Pregnancy and Parenting; Drug Policy Foundation; National Council on Alcoholism and Drug Dependence; National Perinatal Association; Planned Parenthood of Central South Carolina; National Women's Health Network; NOW Legal Defense and Education Fund; South Carolina Chapter of The National Organization for Women; South Carolina Nurses Association; and The Women's Law Project and Operation PAR.

John D. (Jay) Elliott, of Columbia, for Amicus Curiae The Alliance for South Carolina's Children.

TOAL, A.J.: This case concerns the scope of the child abuse and endangerment statute in the South Carolina Children's

Code (the Code), S.C. Code Ann. § 20-7-50 (1985).[1] We hold the word "child" as used in that statute includes viable fetuses.

FACTS

On April 20, 1992, Cornelia Whitner (Whitner) pled guilty to criminal child neglect, S.C. Code Ann. § 20-7-50 (1985), for causing her baby to be born with cocaine metabolites in its system by reason of Whitner's ingestion of crack cocaine during the third trimester of her pregnancy. The circuit court judge sentenced Whitner to eight years in prison. Whitner did not appeal her conviction.

Thereafter, Whitner filed a petition for Post Conviction Relief (PCR), pleading the circuit court's lack of subject matter jurisdiction to accept her guilty plea as well as ineffective assistance of counsel. Her claim of ineffective assistance of counsel was based upon her lawyer's failure to advise her the statute under which she was being prosecuted might not apply to prenatal drug use. The petition was granted on both grounds. The State appeals.

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[1] Section 20-7-50 was amended in 1993 to make violation of the section a felony and to make the maximum term of imprisonment conform to the new crime classification system. *See* S.C. Code Ann. § 20-7-50 (Supp. 1994). We cite the earlier version of the statute in this opinion because Whitner was prosecuted under that version. The language in the amended section relating to the actions constituting the crime is identical to the language under which Whitner was prosecuted. In other words, although the characterization of and penalty for the crime have changed, the acts constituting the crime have not.

LAW\ANALYSIS

A. Subject Matter Jurisdiction

The State first argues the PCR court erred in finding the sentencing circuit court lacked subject matter jurisdiction to accept Whitner's guilty plea. We agree.

Under South Carolina law, a circuit court lacks subject matter jurisdiction to accept a guilty plea to a nonexistent offense. *See Williams v. State*, 306 S.C. 89, 410 S.E.2d 563 (1991). For the sentencing court to have had subject matter jurisdiction to accept Whitner's plea, criminal child neglect under section 20-7-50 would have to include an expectant mother's use of crack cocaine after the fetus is viable.[2] All other issues are ancillary to this jurisdictional issue.

S.C. Code Ann. § 20-7-50 (1985) provides:

> Any person having the legal custody of any *child* or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such *child*

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[2] The State argues we need not reach the issue of the applicability of section 20-7-50 to viable fetuses, because the indictment alleged a violation on the date of the child's birth. We disagree. The basis for the indictment was the presence of cocaine in the newborn infant. Unless Whitner gave her child cocaine after the child's birth, which no one has alleged, the behavior giving rise to the abuse and neglect charge necessarily occurred before the child was born. Moreover, the record of Whitner's original hearing and the hearing on her petition for Post Conviction Relief make clear the conviction was for her neglecting her child by ingesting crack cocaine during pregnancy. For that reason, we must determine whether section 20-7-50 applies to such behavior.

> or helpless person, so that the life, health or comfort of such *child* or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court. (emphasis added).

The State contends this section encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*.

Under the Children's Code, "child" means a "person under the age of eighteen." S.C. Code Ann. § 20-7-30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code.

In interpreting a statute, this Court's primary function is to ascertain the intent of the legislature. *E.g., State v. Ramsey*, __ S.C.__, 430 S.E.2d 511 (1993). Of course, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *E.g., State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, however, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *E.g., South Carolina Coastal Council v. South Carolina State Ethics Comm'n*, 306 S.C. 41, 410 S.E.2d 245 (1991). Finally, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. *See Berkebile v. Outen*, __ S.C.__, 426 S.E.2d 760 (1993); 82 C.J.S. *Statutes* § 316, at 541-42 (1953).

South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges. In 1960, this Court decided *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). That case concerned the application of South Carolina's wrongful death statute to an infant who died

four hours after her birth as a result of injuries sustained prenatally during viability. The Appellants argued that a viable fetus was not a person within the purview of the wrongful death statute, because, *inter alia*, a fetus is thought to have no separate being apart from the mother.

We found such a reason for exclusion from recovery "unsound, illogical and unjust," and concluded there was "no medical or other basis" for the "assumed identity" of mother and viable unborn child. *Id.* at 262, 113 S.E.2d at 793. In light of that conclusion, this Court unanimously held: "We have no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother *is a person*." *Id.* at 263, 113 S.E.2d at 793 (emphasis added).

Four years later, in *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), we interpreted *Hall* as supporting a finding that a viable fetus injured while still in the womb need not be born alive for another to maintain an action for the wrongful death of the fetus.

> Since a viable child is a *person before separation from the body of its mother* and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an 'act, neglect or default' by the defendant, to the injury of the child . . . .
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> * * *
>
> *Once the concept of the unborn, viable child as a person* is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury.

Id. at 613, 138 S.E.2d at 44 (emphasis added). *Fowler* makes particularly clear that *Hall* rested on the concept of the viable fetus as a person vested with legal rights.

More recently, we held the word "person" as used in a *criminal* statute includes viable fetuses. *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), concerned South Carolina's murder statute, S.C. Code Ann. § 16-3-10 (1976). The defendant in that case stabbed his wife, who was nine months' pregnant, in the neck, arms, and abdomen. Although doctors performed an emergency Caesarean section to deliver the child, the child died while still in the womb. The defendant was convicted of voluntary manslaughter and appealed his conviction on the ground South Carolina did not recognize the crime of feticide.

This Court disagreed. In a unanimous decision, we held it would be "grossly inconsistent . . . to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.* at 447, 319 S.E.2d at 704 (citing *Fowler v. Woodward*, *supra*). Accordingly, the Court recognized the crime of feticide with respect to viable fetuses.

Similarly, we do not see any rational basis for finding a viable fetus is not a "person" in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word "person" in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.

The policies enunciated in the Children's Code also support our plain meaning reading of "person." S.C. Code

Ann. § 20-7-20(C) (1985), which describes South Carolina's policy concerning children, expressly states: "It shall be the policy of this State to concentrate on the *prevention of children's problems* as the most important strategy which can be planned and implemented on behalf of children and their families." (emphasis added). The abuse or neglect of a child at *any* time during childhood can exact a profound toll on the child herself as well as on society as a whole. However, the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth. This policy of prevention supports a reading of the word "person" to include viable fetuses. Furthermore, the scope of the Children's Code is quite broad. It applies "to *all* children who have need of services." S.C. Code Ann. § 20-7-20(B) (1985) (emphasis added). When coupled with the comprehensive remedial purposes of the Code, this language supports the inference that the legislature intended to include viable fetuses within the scope of the Code's protection.

Whitner advances several arguments against an interpretation of "person" as used in the Children's Code to include viable fetuses. We shall address each of Whitner's major arguments in turn.

Whitner's first argument concerns the number of bills introduced in the South Carolina General Assembly in the past five years addressing substance abuse by pregnant women. Some of these bills would have criminalized substance abuse by pregnant women;[3] others would have addressed the issue through mandatory reporting, treatment,

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[3] *See, e.g.*, S. 4032 (1993) (proposing making it a crime for a pregnant woman to ingest a controlled substance); H. 4486 (1994) (proposing amendment to section 20-7-50 to apply to actions of pregnant women).

or intervention by social service agencies.[4] Whitner suggests that the introduction of several bills touching the specific issue at hand evinces a belief by legislators that prior legislation had not addressed the issue. Whitner argues the introduction of the bills proves that section 20-7-50 was not intended to encompass abuse or neglect of a viable fetus.

We disagree with Whitner's conclusion about the significance of the proposed legislation. Generally, the legislature's subsequent acts "cast no light on the intent of the legislature which enacted the statute being construed." *Home Health Servs., Inc. v. DHEC*, 298 S.C. 258, 262 n.1, 379 S.E.2d 734, 736 n.1 (Ct. App. 1989) (citations omitted). Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent. *E.g., State v. Blackmon*, 304 S.C. 270, 403

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[4] *See* S.1495 (1989-1990), reintroduced as S.75 (1990-1991) (requiring drug testing of newborns and to include within civil definition of neglect any newborn testing positive for controlled substance); S.1470 (1989-1990), reintroduced as S.79 (1991) (mandating reporting to DSS pregnant woman believed to have used controlled substance; providing for education and drug treatment); H. 3858 (1990-1991)(requiring reporting of pregnant woman believed to be using controlled substance and expanding civil definition of "abused child" to include newborn testing positive for illegal drugs); S. 986 (1991)(mandating drug testing on newborn infants, requiring reporting such infants as abused under civil abuse laws, and requiring reversible sterilization or implantation of birth control until mother completes drug treatment program); S. 155 (1992-1994) (permitting testing newborns for controlled substances and reporting such test results to DSS for limited purposes); S. 1256 (1992), reintroduced as S. 150 (1992-1993) (permitting referral to DHEC of families with children prenatally exposed to drugs and giving pregnant women priority in drug treatment programs).

S.E.2d 660 (1991). Here, we see no reason to look beyond the statutory language. *See Timmons v. South Carolina Tricentennial Comm'n, supra* (where statute's meaning can be determined from its language, no need to look beyond such language). Additionally, our existing case law strongly supports our conclusion about the meaning of the statute's language.

Whitner also argues an interpretation of the statute that includes viable fetuses would lead to absurd results obviously not intended by the legislature. Specifically, she claims if we interpret "child" to include viable fetuses, *every* action by a pregnant woman that endangers or is likely to endanger a fetus, whether otherwise legal or illegal, would constitute unlawful neglect under the statute. For example, a woman might be prosecuted under section 20-7-50 for smoking or drinking during pregnancy. Whitner asserts these "absurd" results could not have been intended by the legislature and, therefore, the statute should not be construed to include viable fetuses.

We disagree for a number of reasons. First, the same arguments against the statute can be made whether or not the child has been born. After the birth of a child, a parent can be prosecuted under section 20-7-50 for an action that is likely to endanger the child without regard to whether the action is illegal in itself. For example, a parent who drinks excessively could, under certain circumstances, be guilty of child neglect or endangerment even though the underlying act -- consuming alcoholic beverages -- is itself legal. Obviously, the legislature did not think it "absurd" to allow prosecution of parents for such otherwise legal acts when the acts actually or potentially endanger the "life, health or comfort" of the parents' born children. We see no reason such a result should be rendered absurd by the mere fact the child at issue is a viable fetus.

Moreover, we need not address this potential parade of horribles advanced by Whitner. In *this* case, which is the only case we are called upon to decide here, certain facts are clear. Whitner admits to having ingested crack cocaine during the third trimester of her pregnancy, which caused her child to be born with cocaine in its system. Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child. *See, e.g.*, Joseph J. Volpe, M.D., *Effect of Cocaine Use on the Fetus*, 327 NEW ENG. J. MED. 399 (1992); Ira J. Chasnoff, M.D., et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 666 (1985). There can be no question here Whitner endangered the life, health, and comfort of her child. We need not decide any cases other than the one before us.

We are well aware of the many decisions from other states' courts throughout the country holding maternal conduct before the birth of the child does not give rise to criminal prosecution under state child abuse/endangerment or drug distribution statutes. *See, e.g., Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); *Reyes v. Superior Court*, 75 Cal. App. 3d 214 (1977); *State v. Carter*, 602 So. 2d 995 (Fla. Ct. App. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Ct. App. 1991); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992), *cert. denied* (Ga. 1992); *Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App.), *app. denied.*, 471 N.W.2d 619 (Mich. 1991); *Commonwealth v. Kemp*, 643 A.2d 705 (Pa. Super. Ct. 1994). Many of these cases were prosecuted under statutes forbidding delivery or distribution of illicit substances and depended on statutory construction of the terms "delivery" and "distribution." *See, e.g., Johnson v. State, supra*; *State v. Luster, supra*; *People v. Hardy, supra*. Obviously, such cases are inapplicable to the present situation. The cases concerning child endangerment

statutes or construing the terms "child" and "person" are also distinguishable, because the states in which these cases were decided have entirely different bodies of case law from South Carolina. For example, in *Commonwealth v. Welch*, the Kentucky Supreme Court specifically noted Kentucky law has not construed the word "person" in the criminal homicide statute to include a fetus (viable or not). *Welch*, 864 S.W.2d at 281. In *Reyes v. Superior Court*, the California Court of Appeals noted California law did not recognize a fetus as a "human being" within the purview of the state murder and manslaughter statutes, and that it was thus improper to find the fetus was a "child" for purposes of the felonious child endangerment statute. *Reyes*, 75 Cal. App. 3d at 217.

Massachusetts, however, has a body of case law substantially similar to South Carolina's, yet a Massachusetts trial court has held that a mother pregnant with a viable fetus is not criminally liable for transmission of cocaine to the fetus. *See Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990).[5] Specifically, Massachusetts law allows wrongful death actions on behalf of viable fetuses injured *in utero* who are not subsequently born alive. *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1 975). Similarly, Massachusetts law permits homicide prosecutions of third parties who kill viable fetuses. *See Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984)(ruling a viable fetus is a person for purposes of vehicular homicide statute); *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989)(viable fetus is a person for purposes of common law crime of murder). Because of the similarity of the case law in Massachusetts to ours, the *Pellegrini* decision merits examination.

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[5] We note that *Pellegrini* was decided by a Massachusetts superior court. To date, no appellate court in Massachusetts has addressed this issue directly.

In *Pellegrini*, the Massachusetts Superior Court found that state's distribution statute does not apply to the distribution of an illegal substance to a viable fetus. The statute at issue forbade distribution of cocaine to persons under the age of eighteen. Rather than construing the word "distribution," however, the superior court found that a viable fetus is not a "person under the age of eighteen" within the meaning of the statute. *Pellegrini*, slip op. at 11. In so finding, the court had to distinguish *Lawrence* and *Cass*, *supra*, both of which held viable fetuses are "persons" for purposes of criminal laws in Massachusetts.

The Massachusetts trial court found *Lawrence* and *Cass* "accord legal rights to the unborn only where the mother's or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated." *Pellegrini*, slip op. at 11. In other words, a viable fetus should only be accorded the rights of a person for the sake of its mother or both its parents. Under this rationale, the viable fetus lacks rights of its own that deserve vindication. Whitner suggests we should interpret our decisions in *Hall*, *Fowler*, and *Horne* to accord rights to the viable fetus only when doing so protects the special parent-child relationship rather than any individual rights of the fetus or any State interest in potential life. We do not think *Hall*, *Fowler*, and *Horne* can be interpreted so narrowly.

If the *Pellegrini* decision accurately characterizes the rationale underlying *Mone*, *Lawrence*, and *Cass*, then the reasoning of those cases differs substantially from our reasoning in *Hall*, *Fowler*, and *Horne*, *supra*. First, *Hall*, *Fowler*, and *Horne* were decided primarily on the basis of the meaning of "person" as understood in the light of existing medical knowledge, rather than based on any policy of protecting the relationship between mother and child. As a homicide case, *Horne* also rested on the *State's* -- not the mother's -- interest in vindicating the life of the viable fetus. Moreover, the United States Supreme Court has repeatedly

held that the states have a compelling interest in the life of a viable fetus. *See Roe v. Wade*, 410 U.S. 113, 165, 93 S. Ct. 705, 732, 35 L. Ed. 2d 147, 183 (1973); *see also Planned Parenthood v. Casey*, __ U.S. __, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). If, as Whitner suggests we should, we read *Horne* only as a vindication of the mother's interest in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same aces. We decline to read *Horne* in a way that insulates the mother from all culpability for harm to her viable child. Because the rationale underlying our body of law -- protection of the viable fetus -- is radically different from that underlying the law of Massachusetts, we decline to follow the decision of the Massachusetts Superior Court in *Pellegrini*.

The dissent contends that our holding in this case is inconsistent with *Doe v. Clark*, __ S.C. __, 457 S.E.2d 336 (1995). Specifically, it suggests that *Doe v. Clark*, in which we construed another provision of the Children's Code, stands for the proposition that the definition of "child' in S.C. Code Ann. § 20-7-50 (1985) means a "child in being and not a fetus." Contrary to the dissent's characterization of that case, *Doe* turned on the specific language in the consent provisions of the Adoption Act, S.C. Code Ann. § 20-7-1690 and - 1700 (Law. Co-op Supp. 1994).

In *Doe*, Wylanda Clark, who was pregnant, signed a consent form allowing the Does to adopt the child upon its birth. After the child was born, Clark decided she wanted to keep the baby and attempted to argue that the consent she executed was void because it did not contain certain information required by statute. The trial judge held Clark's consent was valid. Clark appealed.

On appeal, we reversed the trial court. However, the basis for our reversal was not that "child" as defined in the Children's Code only includes born children, but that the adoption statutes contemplate that the natural mother's consent to the adoption must be given after the birth of the child to be adopted. *Doe*, __ S.C. at __, 457 S.E.2d at 337. Specifically, section 20-7-1700(A)(3) requires the consent form to contain the race, sex, and *date of birth* of the adoptee, as well as any names by which the adoptee has been known. Clearly, the date of birth requirement could not be fulfilled until after the birth of the child. Furthermore, section 20-7-1690, which specifies who must consent to an adoption, provides that consent is required of "the mother of a child *born* when the mother was not married." (emphasis added). Citing these sections as well as the Children's Code's definition of child, we concluded that a natural mother cannot consent to adoption until after the birth of her child. *Id.* We did *not* hold that the term "child" excludes viable fetuses, nor do we think our holding in *Doe* can be read so broadly.

Finally, the dissent implies that we have ignored the rule of lenity requiring us to resolve any ambiguities in a criminal statute in favor of the defendant. The dissent argues that "[a]t most, the majority only suggests that the term 'child' as used in § 20-7-50 is ambiguous," and that the ambiguity "is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance on decisions in two different fields of the law, civil wrongful death and common law feticide."

Plainly, the dissent misunderstands our opinion. First, we do not believe the statute is ambiguous and, therefore, the rule of lenity does not apply. Furthermore, our interpretation of the statute is based primarily on the plain meaning of the word "person" as contained *in the statute.* We need not go beyond that language. However, because our prior decisions in *Murphy*, *Fowler*, and *Horne* support our reading of the

statute, we have discussed the rationale underlying those holdings. We conclude that both statutory language and case law compel the conclusion we reach. We see no ambiguity.

B. Ineffective Assistance of Counsel

The State next argues the PCR court erred in holding Whitner received ineffective assistance of counsel. We agree.

To prove ineffective assistance of counsel, a PCR applicant must show (1) deficient performance by her attorney and (2) prejudice resulting therefrom. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove prejudice when challenging a guilty plea, the applicant must show that but for counsel's deficient performance, the applicant would not have pled guilty. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985). In this case, the basis for the ineffective assistance claim was the failure of Whitner's counsel to inform her section 20-7-50 did not apply to prenatal drug use. Whitner contends she would not have pled guilty if her lawyer had given her such advice.

Given our holding that section 20-7-50 *is* applicable to an expectant mother's illegal drug use after the fetus is viable, we cannot say Whitner's lawyer's failure to advise her of the statute's *inapplicability* constituted deficient performance. In fact, both the unambiguous language of the statute and this Court's prior case law justify counsel's belief the child neglect statute applied to Whitner's actions. Therefore, the PCR court erred in ruling Whitner received ineffective assistance of counsel.

C. Constitutional Issues

Respondent Whitner argues section 20-7-50 is unconstitutional as applied to an expectant mother's actions. However, *none* of these arguments were ever raised to the

PCR court. All the arguments before that court were based on the scope of section 20-7-50.[6] Moreover, the PCR judge's Final Order makes no mention of these constitutional arguments, and the Record does not reflect any motion under Rule 59(e), SCRCP, to amend or alter the judgment. Having failed to raise the issue below, Whitner cannot raise it before this Court. *E.g., Plyer v. State,* 309 S.C. 408, 424 S.E.2d 477 (1992)(issue not raised before PCR court will not be considered on appeal).

CONCLUSION

For the foregoing reasons, the decision of the PCR Court is **REVERSED**.

WALLER and BURNETT, JJ., concur. FINNEY, C.J., and MOORE, A.J., dissenting in separate opinions.

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[6] We were able to find only one instance in which counsel even arguably raised the constitutional issues argued here. During arguments before the PCR court, Whitner's counsel once commented:

> That gets to the other issues involved and whether or not it violates the right of privacy...but *I don't think we even have to get into that fully.*

ROA at 56 (emphasis added). We do not think this passing statement raises the constitutional issues. Even if it did, however, the PCR court's Final Order made no mention of the issues and Whitner's counsel failed to preserve them by moving under Rule 59(e), SCRCP, for a motion to alter or amend the judgment. *See, e.g., State v. Woodruff*, 300 S.C. 265, 387 S.E.2d 453 (1989)(issues not preserved below will not be considered on appeal).

FINNEY, C.J.: I respectfully dissent, and would affirm the grant of post-conviction relief to respondent Whitner.

The issue before the Court is whether a fetus is a "child" within the meaning of S.C. Code Ann. § 20-7-50 (1985), a statute which makes it a misdemeanor[1] for a "person having legal custody of any child or helpless person" to unlawfully neglect that child or helpless person. Since this is a penal statute, it is strictly construed against the State and in favor of respondent. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991).

The term child for purposes of § 20-7-50 is defined as a "person under the age of eighteen" unless a different meaning is required by the circumstances. S.C. Code Ann. § 20-7-30 (1) (1985). We have already held that this same definition found in another part of the Children's Code means a child in being and not a fetus. *Doe v. Clark*, __ S.C. __, 457 S.E.2d 336 (1995). It would be incongruous at best to hold the definition of "child" in the civil context of *Doe* is more restrictive than it is in the criminal context we consider today.

More importantly, it is apparent from a reading of the entire statute that the word child in § 20-7-50 means a child in being and not a fetus. *See Jackson v. Charleston County School District*, ___ S.C. ___, 447 S.E.2d 859 (1994) (when construing a statute, we do not view its terms in isolation, but rather in the context of the entire statute and its intended purpose). A plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children, and not those which may harm fetuses. First, § 20-7-50 does not impose criminal liability on every person who neglects a child, but only on a person having **legal**

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[1] After this case arose, the statute was amended to change the classification from misdemeanor to felony. 1993 Act No. 184, §55 (effective January 1, 1994).

custody of that child. The statutory requirement of legal custody is evidence of intent to extend the statute's reach only to children, because the concept of legal custody is simply inapplicable to a fetus. *See Stone v. State*,__ S.C. __, 443 S.E.2d 544 (1994)(statutes are construed so as to avoid absurd results). Second, § 20-7-50 refers to S. C. Code Ann. § 20-7490 (1985 and Supp. 1994) for the definition of neglect. Section 20-7-490 defines a neglected child as one harmed or threatened with harm, and further defines harm. §20-7-490(B), (C), and (D). The vast majority of acts which constitute statutory harm under § 20-7-490 are acts which can only be directed against a child, and not towards a fetus.[2] The reliance upon § 20-7-490 in § 20-7-50 is further evidence that the term child as used in the child neglect statute does not encompass a fetus. Read in context, and in light of the statutory purpose of protecting persons of **tender years**[3] it is clear that "child" as used in § 20-7-50 means a child in being. *Jackson v. Charleston County School District, supra.*

At most, the majority only suggests that the term "child" as used in § 20-7-50 is ambiguous. This suggestion of ambiguity is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance on decisions in two different fields of the law, civil wrongful death and common law feticide. Here, we deal with the Children's Code, and the meaning of language used in a criminal statute under that Code. We have already indicated that a child within the meaning of § 20-7-90(A)(1985), which

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[2] Examples include condoning delinquency, using excessive corporal punishment, committing sexual offenses against the child, and depriving her of adequate food, clothing, shelter or education.

[3] *State v. Jenkins,* 278 S.C. 219, 294 S.E.2d 44 (1982)(construing § 16-3-1030, recodified as § 20-7-50).

criminalizes non-support, must be one already born. *State v. Montgomery,* 246 S.C. 545, 144 S.E.2d 797 (1965)(indictment for violation of predecessor of § 20-7-90(A) fatally defective for failing to identify the child by description or date of birth); *see also Doe v. Clark, supra.* Even if these wrongful death, common law, and Children's Code decisions are sufficient to render the term child in § 20-7-50 ambiguous, it is axiomatic that the ambiguity must be resolved in respondent's favor. *State v. Blackmon, supra.*

I would affirm.

MOORE, A.J.: I concur with the dissent in this case but write separately to express my concerns with today's decision.

In my view, the failure of the legislature on eleven occasions to pass proposed bills addressing the problem of drug use during pregnancy is evidence the child abuse and neglect statute is not intended to apply in this instance. This Court should not invade what is clearly the sole province of the legislative branch. At the very least, the legislature's failed attempts to enact a statute regulating a pregnant woman's conduct indicate the complexity of this issue. While the majority opinion is perhaps an argument for what the law *should* be, it is for the General Assembly, and not this Court, to make that determination by means of a clearly drawn statute. With today's decision, the majority not only ignores legislative intent but embarks on a course rejected by every other court to address the issue.

As discussed in the Chief Justice's dissent, we are bound by the rules of statutory construction to strictly construe a criminal statute in favor of the defendant and resolve any ambiguity in her favor. *State v. Blackmon, supra.* I cannot accept the majority's assertion that the child abuse and neglect statute unambiguously includes a "viable fetus." If that is the case, then why is the majority compelled to go

to such great lengths to ascertain that a "viable fetus" is a "child?"

Contrary to the majority's strained analysis in this case, one need look no further than the language of § 20-7-50 to clearly discern legislative intent that the statute apply only to children in being. "Legal custody" is not a qualification applicable to a viable fetus. I simply disagree the legislature intended a statute entitled "Unlawful neglect of child or helpless person by legal custodian" to render a pregnant woman criminally liable for any type of conduct potentially harmful to the unborn fetus.

In construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful. Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to take vitamins and eat properly? Failure to quit smoking or drinking? Although the majority dismisses this issue as not before it, the impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize. To ignore this "down-the-road" consequence in a case of this import is unrealistic.

The majority attempts to support an overinclusive construction of the child abuse and neglect statute by citing other legal protections extended equally to a viable fetus and a child in being. The only law, however, that specifically regulates the conduct of a mother toward her unborn child is our abortion statute under which a viable fetus is in fact treated differently from a child in being.[1]

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[1] A woman may have a legal abortion of a viable fetus if necessary to preserve her health, S.C. Code Ann. §44-41-20(c) (1985), while, of course, she may not justify the death of a child in being on this ground.

The majority argues for equal treatment of viable fetuses and children, yet its construction of the statute results in even greater inequities. If the statute applies only when a fetus is "viable," a pregnant woman can use cocaine for the first twenty-four weeks[2] of her pregnancy, the most dangerous period for the fetus, and be immune from prosecution under the statute so long as she quits drug use before the fetus becomes viable. Further, a pregnant woman, under the majority opinion, now faces up to ten years in prison for ingesting drugs during pregnancy but can have an illegal abortion and receive only two-year sentence for killing her viable fetus.[3]

Because I disagree with the conclusion § 20-7-50 includes a viable fetus, I would affirm the grant of post-conviction relief.

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[2] Viability is presumed to occur no sooner than the twenty-fourth week of pregnancy. S.C. Code Ann. §44-41-10(1) (1985).

[3] S.C. Code Ann. § 44-41-80(b) (1985).

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

COURT OF GENERAL SESSIONS
92-GS-39-670

STATE OF SOUTH CAROLINA :
:
-vs- : TRANSCRIPT OF
: RECORD
CORNELIA WHITNER :

MONDAY, APRIL 20, 1992

PICKENS, SOUTH CAROLINA

B E F O R E:

HONORABLE FRANK EPPES, JUDGE.

A P P E A R A N C E S:

MICHELLE NELSON, ESQUIRE
ATTORNEY FOR THE STATE

CHERYL AARON, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DIANNE A. JOSEPH

CIRCUIT COURT REPORTER

THE COURT: IS THIS A CRACK BABY?
DEFENDANT: YES, SIR.
THE COURT: WHY WOULDN'T YOU JUST TAKE A PISTOL AND PUT IT IN YOUR MOUTH AND BLOW YOUR HEAD OFF? YOU WOULDN'T DO THAT, WOULD YOU?
DEFENDANT: NO, SIR.
THE COURT: WELL, WHY ARE YOU FOOLING WITH CRACK COCAINE?
DEFENDANT: I NEED SOME HELP, YOUR HONOR.
THE COURT: HOW OLD ARE YOU?
DEFENDANT: 28.
THE COURT: HOW OLD?
DEFENDANT: 28.
THE COURT: YOU'RE GETTING TOO OLD TO BE FOOLING WITH THAT STUFF. HOW MANY BABIES YOU GOT?
DEFENDANT: I GOT THREE. THREE.
THE COURT: ARE ALL OF THEM CRACK BABIES?
DEFENDANT: HUH-UH.
THE COURT: DO YOU UNDERSTAND YOU CAN GET 10 YEARS FOR THAT?
DEFENDANT: YES.
THE COURT: YOU HAVE A RIGHT TO A TRIAL BY JURY. THE JURY MAY FIND YOU GUILTY, THEY MAY FIND YOU NOT GUILTY. YOU DO NOT HAVE TO TESTIFY. IF YOU DO NOT TESTIFY, I CHARGE THE JURY THEY COULDN'T HOLD THAT AGAINST YOU. DO YOU WANT TO WAIVE, FORFEIT, GIVE UP ALL YOUR CONSTITUTIONAL RIGHTS AND

PLEAD GUILTY?
DEFENDANT: YES.
THE COURT: ALL RIGHT. TELL ME ABOUT IT.
MS. NELSON: MAY IT PLEASE THE COURT. YOUR HONOR, ON FEBRUARY 2ND OF THIS YEAR MS. WHITNER GAVE BIRTH TO A MINOR CHILD, KEVIN SEAN (PHONETIC) WHITNER, AT THE EASLEY BAPTIST MEDICAL CENTER. THE BABY WAS TESTED AND TESTED POSITIVE FOR COCAINE.
I WOULD ADVISE THE COURT THAT MS. WHITNER -- THAT THE CHILD IS NOW IN THE CUSTODY OF -- THAT MS. WHITNER IS NOT IN CUSTODY OF ANY OF HER CHILDREN. AND SHE WAS BEFORE YOUR HONOR IN DECEMBER ON A DIFFERENT CHILD NEGLECT CHARGE.
THE COURT: YOU ON PROBATION NOW?
MS. NELSON: YEAH.
THE COURT: HAVE YOU SERVED THE WARRANT ON HER?
MS. AARON: YOUR HONOR, I DON'T BELIEVE THIS WOULD CONSTITUTE A VIOLATION.
THE COURT: SEE WHEN SHE WAS PLACED ON PROBATION. THIS HAPPENED IN FEBRUARY.
MS. NELSON: YOUR HONOR, SHE WAS PUT ON PROBATION ON DECEMBER 18. SHE GOT 10 YEARS SUSPENDED ON 5 YEARS PROBATION, 500 HOURS COMMUNITY SERVICE.
THE COURT: THIS WOULD BE A VIOLATION.
DEFENDANT: UM ---
THE COURT: MA'AM?

DEFENDANT: WELL. TAMARA (PHONETIC) TOLD ME THAT SINCE IT HAPPENED BEFORE THEN -- BEFORE I GOT ON IT.

THE COURT: WELL, THIS -- IF THE BABY'S BORN ON -- THE BABY WAS BORN AFTER THAT, YOU WERE PLACED ON PROBATION?

DEFENDANT: YEAH. BUT, SEE, I WAS ---

THE COURT: WHAT? TELL ME.

DEFENDANT: SHE SAID -- SHE TOLD ME THAT IT ---

THE COURT: WHO SAID THAT?

DEFENDANT: TAMARA, MY PROBATION OFFICER.

THE COURT: WHO?

DEFENDANT: TAMARA.

MS. AARON: TAMARA FLANNIGAN (PHONETIC), HER PROBATION AGENT.

THE COURT: WELL, YOU UNDERSTAND YOU CAN GET 10 YEARS FOR THIS?

DEFENDANT: YES.

THE COURT: YOU HAVE A RIGHT TO A TRIAL BY JURY. A JURY MAY FIND YOU GUILTY, MAY FIND YOU NOT GUILTY. YOU DO NOT HAVE TO TESTIFY. THE STATE IS REQUIRED TO PROVE YOU GUILTY BEYOND A REASONABLE DOUBT. IF YOU DO NOT TESTIFY, I CHARGE THE JURY THEY COULDN'T HOLD THAT AGAINST YOU. AND YOU STILL WANT TO PLEAD GUILTY?

DEFENDANT: YES.

THE COURT: ALL RIGHT. TELL ME ABOUT HER, MS. AARON.

MS. AARON: MAY IT PLEASE THE COURT, YOUR HONOR.

CORNELIA IS 28 YEARS OLD. SHE DID HAVE AN ADDICTION PROBLEM.
SHE INDICATES THAT SHE WAS-CLEAN BEFORE THE BIRTH OF HER
CHILD, AND ALSO, SHE HAS BEEN IN DRUG COUNSELING SINCE AND
WANTS TO CONTINUE ---
DEFENDANT: A TREATMENT CENTER.
MS. AARON: SHE WOULD LIKE TO GO TO AN IN-PATIENT
TREATMENT CENTER. THE BABY WHICH SHE HAD IN FEBRUARY IS IN
GOOD HEALTH NOW. AND D.S.S. OR ANOTHER INDIVIDUAL HAS CUSTODY
OF THE REST OF HER CHILDREN. SHE WOULD LIKE TO GET HERSELF
STRAIGHTENED OUT. SHE INDICATES THAT SHE HAS NOT USED DRUGS
SINCE BEFORE THIS CHILD WAS BORN IN FEBRUARY, BUT SHE BELIEVES
THAT SHE NEEDS SOME IN-PATIENT HELP TO REMAIN THAT WAY.
THE COURT: 670. I THINK I'LL JUST LET HER GO TO JAIL.
THE SENTENCE OF THE COURT IS YOU BE CONFINED TO THE STATE
BOARD OF CORRECTIONS FOR A PERIOD OF 8 YEARS. ATTEND A.T.U.
YOU ALL CHECK ON THAT AND SEE WHETHER THAT'S A VIOLATION
OF HER PROBATION.
--- END OF TRANSCRIPT OF RECORD ---

I, THE UNDERSIGNED DIANNE A. JOSEPH, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR PICKENS COUNTY, SOUTH CAROLINA, ON THE 20TH DAY OF APRIL 1992.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

JULY 9, 1993

s./Dianne E. Joseph
COURT REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

Cornelia Whitner, 186151

Petitioner,

-vs-

State of South Carolina,

Respondent.

APPLICATION FOR POST-CONVICTION RELIEF
93-CP-39-347

1. Place of Detention:
The Petitioner is presently detained with the South Carolina Department of Corrections, Leath Correctional Institution, Greenwood, SC

2. Name and location of Court which imposed sentence:
Pickens County General Sessions Court, Pickens, SC

3. The indictment number or numbers upon which and the offense for which sentence was imposed:
92-GS-39-670 for a violation of South Carolina Code of Laws § 20-7-50

4. The date upon which sentence was imposed and the term of the sentence:
The petitioner was sentenced on April 20, 1992 to a term of eight years imprisonment.

5. The finding of guilty was made after a plea of guilty.

6. Did you appeal from the judgment of conviction or the imposition of sentence?
No.

7. If you answered "yes" to (6), list
   a. the name of each Court to which you appealed:
      i. Not Applicable
   b. the result in each such Court to which you appealed:
      i. Not Applicable
   c. the date if each such result
      i. Not Applicable
   d. if known, citations of any written opinion or orders entered pursuant to such result:
      i. Not Applicable

8. If you answered "no" to (6), state your reasons for not so appealing:
   a. I was not informed of my right to appeal.
   b. I not believe that a plea of guilty could be appealed.

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   a. I entered a plea of guilty to a crime that does not exist in South Carolina.
   b. The indictment and facts upon which I plead guilty does not allege a crime. To allow a conviction upon an indictment and facts that do not allege a crime is a violation of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America.
   c. I was denied effective assistance of counsel in that I plead guilty to crime that does not exist.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):
    a. I was indicted for child abuse for giving birth to a child who had cocaine in his system. I am now informed that the statute under which I was indicted and plead guilty does not apply to a fetus.
    b. A person can only be imprisoned for a crime. As the facts under which I entered a plea of guilty do not constitute a crime, I am being unlawfully held in prison.
    c. My attorney failed to adequately research the question as to whether taking drugs while pregnant was a violation of South Carolina Code of Laws § 20-7-50.

11. Prior to this application have you filed with respect to this conviction:
    a. any petition in a State Court under South Carolina law?
    No
    b. any petitions in State or Federal Courts for habeas corpus or post conviction relief? No
    c. any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified? No
    d. any other petitions, motions or applications in this or any other Court? No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application. Question 11 was answered in the negative.

13. Has any ground set forth in (9) been previously presented to this or any other Court, State, or Federal, in any petition, motion or application which you have filed? No.

14. If you answered "yes" to (13) identify:
    a. which grounds have been presented:
        i. Question 13 was answered in the negative.
    b. the proceeding in which each ground was raised:
        i. Question 13 was answered in the negative.

15. If any ground set fourth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reason why such ground has not previously been presented:
    a. No ground raised in this application has previously been presented to any court on my behalf. My attorney did not raise the issue at the time of my plea. I did not have sufficient legal knowledge to raise the issues.

16. Were you represented by an attorney at any time during the course of:
    a. your arraignment and plea? Yes
    b. your trial, if any? No
    c. your sentencing? Yes
    d. your appeal, if any, from the judgment or conviction or the imposition of sentence? No
    e. preparation, presentation, or consideration of any petitions, motions, or applications with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:
    a. the name and address of each attorney who represented you
        i. Cheryl Aaron
           Pickens, SC

ii. C. Rauch Wise
408 Main Street
Greenwood, SC 29646

b. the proceeding at which each attorney represented you.

I. Cheryl Aaron represented me at the time of my plea.

ii. C. Rauch Wise represented me in the preparation of this application for post conviction relief.

18. State clearly the relief you seek in filing this application.
I seek to have my guilty plea set aside and for a ruling that South Carolina Code of Laws § 20-7-50 does not apply to a fetus.

19. Are you under sentence from any other court that you have not challenged? No.

STATE OF SOUTH CAROLINA)
) **VERIFICATION**
COUNTY OF GREENWOOD)

I, Cornelia Whitner, being duly sworn upon my oath, deposes and says that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Sworn to and Subscribed
before me this 10 day of
May, 1993

s./Cornelia Whitner
CORNELIA WHITNER

s./C. Rauch Wise
Notary Public for South Carolina
My commission expires: 2/1/2000

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Cornelia Whitner, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Sworn to and Subscribed
before me this 10 day of
May, 1993

s./Cornelia Whitner
CORNELIA WHITNER

s./C. Rauch Wise
Notary Public for South Carolina
My commission expires: 2/1/2000

s./Oliver A. Nealy
Clerk of Court

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF PICKENS	) PLEAS
	) 93-CP-39-347
	)
Cornelia Whitner, 186161,	)
	)
Applicant,	) **ORDER**
	)
vs.	)
	)
State of South Carolina,	)
	)
Respondent.	)
----------	)

Cornelia Whitner brought this action for post-conviction relief (PCR) on the grounds that the court lacked subject matter jurisdiction to accept her guilty plea and for ineffective assistance of counsel. The application is granted, and the sentence is vacated.

The Applicant was indicted in April, 1992, under S.C. Code Ann. § 20-7-50 (1985) for unlawful neglect of a child because she allegedly used crack cocaine while she was pregnant. She was not charged with any other crime. Being represented by court-appointed counsel, Cheryl Aaron, Ms. Whitner pled guilty to the charge and was sentenced to eight years in prison. Ms. Whitner did not appeal her conviction, but has brought this application for post-conviction relief.

I.

A PCR application may properly be brought on grounds that a trial court lacked subject matter jurisdiction to accept a guilty plea where the plea was premised upon an offense that does not exist. *Williams v. State*, 410 S.E.2d 563, 564 (S.C. 1991). The Applicant, who admitted to having a

drug addiction problem, pled guilty under a child abuse and neglect statute, which provides:

> Any person having the legal custody of a child or helpless person, who shall, without lawful excuse, refuse or neglect to provide ... the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and, shall be punished within the discretion of the circuit court.

S.C. Code Ann. § 20-7-50 (1986).

Ms. Whitner claims in her application that this statute does not apply to her since the only conduct that may have harmed her child was her use of crack cocaine while the child was still a fetus.

> It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the Legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.

State v. Blackmon, 403 S.E.2d 660, 662 (S.C. 1991) (citations omitted); *accord, e.g., Morgan v. S.C. Dept, of Social Services,* 313 S.E.2d 350, 352 (S.C.App. 1984) (words should be given their ordinary and popular significance); *State v. Sims,* 405 S.E.2d 377, 385 (S.C. 1991).

> Penal statutes are construed strictly against the State and in favor of the defendant. *State v. Cutler,* 274 S.C. 376, 264 S.E.2d 420 (1980). As was aptly summarized by Chief Justice Marshall in *United States v. Wiltberger,* (18 U.S.) 5 Wheaton 76, 95-96, 5 L.Ed. 37, 42 (1820): The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the Judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. . . The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so.

Williams v. State, supra, at 564.

Against those well-established principles, the state's argument must fail. The statute states that it applies to a "child or helpless person." The Children's Code, which includes this statute, defines "child" as "a person under the age of eighteen." S.C. Code Ann. § 20-70-490 (1985). The plain, ordinary, and popular meaning of "a person under the age of eighteen" does not include a fetus. In interpreting a statute in similar circumstances, the Ohio Supreme Court held that "the child did not become a 'child' within the

contemplation of the statute until she was born," *State v. Gray,* 584 N.E.2d 710, 711 (Ohio 1992). *See also State v. Luster,* 419 S.E.2d 32, 34 (Ga.App. 1992) (interpreting "person" not to include a fetus). For this statute to apply, the Legislature would simply have to add the word "fetus" or "unborn child" to § 20-7-50. As the statute currently stands, it would be difficult, consistent with our accepted rules of statutory construction, to interpret this statute in a civil context to apply to a fetus. However, given our well-established rule that criminal statutes must be strictly construed against the State, it is not difficult to conclude that the crime for which Ms. Whitner was charged does not exist in South Carolina.

No appellate court in our nation has interpreted its child abuse laws to apply to a woman who takes illegal drugs during pregnancy. *E.g., State v. Gray, supra; State v. Gethers,* 585 So.2d 1140 (Fla.App. 4 Dist. 1991). Prosecutors in other states have similarly tried to convict pregnant woman who used illegal drugs by charging them under drug distribution statutes, arguing that she passed the drugs through the umbilical cord. However, this approach has also failed. *E.g., State v. Luster, supra,; Johnson v. State,* 602 So.2d 1288 (Fla. 1992).

It is not for this court to decide whether taking illegal drugs during pregnancy should make a mother liable for child abuse. Whether including fetuses within our child abuse laws would deter pregnant women from seeking medical treatment or would, on the contrary, deter them from taking illegal drugs in the first place is an important question. But it is just the type of question that the Legislature must decide. "The Legislature is [the] appropriate forum to discuss public policy, as well as the complexity of prenatal drug use, its affect upon an infant, and its criminalization." *People v. Hardy,* 469 N.W.2d 50, 53 (Mich.App. 1991). Accordingly, this court has no choice but to interpret this statute not to apply to a fetus and dismiss the case.

II.

The Applicant further claims that her counsel was ineffective during the guilty plea proceeding. "To establish a claim of ineffective assistance of counsel, petitioner must show that counsel's performance was deficient and but for this deficiency petitioner would not have pled guilty. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984); *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed 203 (1985)." *Murdaugh v. State,* 426 S.E.2d 740, 742 (S.C. 1992); *accord Thornes v. State* 426 S.E.2d 764, 765 (S.C. 1993). *Strickland* requires that the performance of counsel be evaluated against the background of prevailing professional norms." *Jordan v. State* 374 S.E.2d 683, 684 (S.C. 1988) (citation omitted).

At the time Ms. Whitner pled guilty, no circuit court in this state had ruled on whether § 20-7-50 applied to a woman who used drugs during her pregnancy. However, as discussed *supra,* other states had ruled that similar statutes did not apply to these facts. Further, counsel was undoubtedly aware of our court's rules of statutory construction -- especially the requirement to construe penal statutes against the State. Yet, counsel did not challenge the application of § 20-7-50 to these facts. It is probable that Ms. Whitner would not have pled guilty had she been made aware that her indictment stood on shaky legal ground. Therefore, the Applicant received ineffective assistance of counsel. *See Murdaugh v. State, supra* (counsel ineffective during guilty plea where he failed to distinguish between a counterfeit and imitation drug offense).

For the reasons stated above, the trial court lacked subject matter jurisdiction to accept the Applicant's plea since the crime for which she pled guilty did not exist, and the Applicant received ineffective assistance of counsel. Although the Applicant would have only been entitled to a new trial based on ineffective assistance of counsel, she is entitled to

have the sentence vacated since the court lacked jurisdiction. Accordingly, the sentence is vacated and the case is dismissed.

AND IT IS SO ORDERED.

s./Larry R. Patterson
Larry R. Patterson
Presiding Judge
Thirteen Judicial Circuit

November 22, 1993

Pickens, South Carolina

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

November 19, 1997

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St.
Greenwood, SC 29646

Lynn M. Paltrow, Esquire
Center for Reproductive Law
120 Wall Street, 18th Floor
New York, N.Y. 10005

Re: Whitner, Cornelia v. State

Dear Counsel:

The Court has issued the following Order on your petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s./Jean H. Toal A.J.

s./John H. Waller, Jr. A.J.

s./E.C. Burnett, III A.J.

"I would grant Rehearing.

s./Ernest A. Finney, Jr. C.J.

s./James E. Moore A. J.

November 17, 1997."

The remittitur in this matter is today being forwarded to the Clerk of Court for Pickens County.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

November 20, 1997

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St.
Greenwood, SC 29646

Lisa S. Tankoos, Esquire
Lynn M. Paltrow, Esquire
120 Wall Street, 18th Floor
New York, NY 10005

Re: Whitner, Cornelia v. State

Dear Counsel:

Please be advised that this Court will not take any action on the Petition to Allow Petitioner to Remain on Bond that was filed in this office on August 6, 1996.

By copy of this letter we are advising all interested parties of this action.

Very truly yours,

CLERK

CND, Jr./dmh

cc: Attorney General Charles Molony Condon
Deputy Attorney General John W. McIntosh

Assistant Attorney General David K. Avant
Carol E. Tracy, Esquire
John D. Elliott, Esquire

Cornelia Whitner v. State
Page Two
November 20, 1997

cc: Robert H. Hood, Esquire
Joseph c. Wilson, IV, Esquire
Stephen Phillip Williams, Esquire
Susan Frietsche, Esquire
Susan King Dunn, Esquire

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF
)	GENERAL SESSIONS
COUNTY OF ANDERSON)	92-GS-04-01
)	
THE STATE,)	
)	
VS.)	
)	
MALISSA ANN CRAWLEY,)	
)	
DEFENDANT.)	

GUILTY PLEA BEFORE THE HONORABLE TOM J. ERVIN, ESQUIRE, PRESIDING JUDGE CIRCUIT COURT JUDGE, AT THE ANDERSON COUNTY COURTHOUSE, ANDERSON, SOUTH CAROLINA, ON JANUARY 6, 1992.

APPEARANCES:
DRUANNE WHITE, ESQUIRE
ASSISTANT SOLICITOR

ROBERT GAMBLE, ESQUIRE
ATTORNEY FOR THE DEFENDANT

SUSAN AHEARN-HAWKINS, CVR
CIRCUIT COURT REPORTER

THE COURT: MS. CRAWLEY, WOULD YOU RAISE YOUR RIGHT HAND, PLEASE.

(MALISSA ANN CRAWLEY, IS FIRST DULY SWORN.)

THE COURT: MALISSA ANN CRAWLEY IS CHARGED IN THE INDICTMENT WITH UNLAWFUL NEGLECT OF A CHILD.

MRS. WHITE, HAVE THERE BEEN ANY NEGOTIATIONS IN THIS CASE?

MRS. WHITE: YES SIR, YOUR HONOR.

THE COURT: GO AHEAD AND STATE THEM

MRS. WHITE: WE HAVE A RECOMMENDED SENTENCE OF FIVE YEARS SUSPENDED ON FIVE YEARS PROBATION WITH COMPLIANCE WITH ANY FAMILY COURT TREATMENT PLANS, RANDOM DRUG TESTING, AND GO TO ADAC OR SOME OTHER FACILITY SUCH AS THAT TO GET HELP WITH DRUGS.

THE COURT: MR. GAMBLE, YOU REPRESENT MS. CRAWLEY?

MR. GAMBLE: I DO, YOUR HONOR.

THE COURT: AND YOU'VE EXPLAINED THAT RECOMMENDATION TO HER?

MR. GAMBLE: YES SIR. I'VE GONE OVER THAT WITH HER.

THE COURT: HOW DOES SHE INDICATE SHE WISHES TO PLEAD?

MR. GAMBLE: GUILTY, YOUR HONOR.

THE COURT: AND YOU'VE EXPLAINED TO HER THAT IF

SHE DOES PLEAD GUILTY SHE GIVES UP HER RIGHTS, INCLUDING HER RIGHT TO A JURY TRIAL?

MR. GAMBLE: YES SIR.

THE COURT: DO YOU BELIEVE SHE UNDERSTANDS ALL HER RIGHTS AND THE PENALTIES SHE COULD RECEIVE?

MR. GAMBLE: I DO, YOUR HONOR.

THE COURT: DO YOU AGREE WITH HER DECISION TO PLEAD GUILTY?

MR. GAMBLE: YES SIR, I DO.

EXAMINATION OF MALISSA ANN CRAWLEY BY THE COURT:

Q MS. CRAWLEY, HOW OLD ARE YOU?

A THIRTY (30).

Q HOW FAR DID YOU GO IN SCHOOL

A 12TH GRADE.

Q ARE YOU UNDER THE INFLUENCE OF ANY ALCOHOL OR DRUGS TODAY?

A NO SIR.

Q ARE YOU SATISFIED WITH THE WAY IN WHICH YOUR ATTORNEY, MR. GAMBLE, HAS REPRESENTED YOU IN THIS MATTER

A YES SIR.

Q DO YOU WANT A JURY TRIAL?

A NO SIR.

Q YOU'RE PLEADING GUILTY BECAUSE YOU ARE GUILTY?

A YES SIR.

Q NO ONE'S THREATENED YOU TO PLEAD GUILTY?
A NO SIR.
Q DO YOU UNDERSTAND IF YOU VIOLATE PROBATION YOU COULD SERVE UP TO FIVE YEARS?
A YES SIR.
MRS. WHITE: JUDGE, THIS HAS NOT BEEN TO THE GRAND JURY.
Q. ARE YOU WISHING TO WAIVE YOUR RIGHT TO HAVE THIS SENT TO THE GRAND JURY?
A YES SIR.
Q AT THAT TIME THE GRAND JURY COULD NO BILL THE CASE WHICH COULD END THE MATTER, BUT YOU GIVE UP THAT RIGHT IF YOU WAIVE OR GIVE UP PRESENTMENT. DID YOU UNDERSTAND THAT?
A YES SIR.
Q DO YOU UNDERSTAND THAT THE STATE WOULD HAVE THE BURDEN OF PROVING YOUR GUILT AT TRIAL BEYOND A REASONABLE DOUBT, THAT YOU COULD TESTIFY IN YOUR OWN BEHALF, THAT YOU COULD SUBPOENA WITNESSES IN YOUR OWN DEFENSE, CONFRONT AND CROSS EXAMINE THE WITNESSES AGAINST YOU -- AND DON'T EVEN HAVE TO TESTIFY? DO YOU UNDERSTAND ALL THAT?
A YES SIR.
Q YOU STILL WANT TO PLEAD GUILTY?
A YES SIR.

THE COURT: I FIND YOUR DECISION TO PLEAD GUILTY AND WAIVE PRESENTMENT IS FREELY, VOLUNTARILY AND INTELLIGENTLY MADE, ALL UPON THE ADVICE AND COUNSEL OF A COMPETENT ATTORNEY WITH WHOM YOU'RE SATISFIED AND YOUR PLEA IS ACCEPTED. THE RECOMMENDATIONS ARE ALSO ACCEPTED.

MR. GAMBLE, IS FAMILY COURT CURRENTLY SUPERVISING THIS MATTER?

MR. GAMBLE: FAMILY COURT IS INVOLVED IN THE MATTER, YOUR HONOR, SO I'M NOT SURE WHAT'S --

MS. CRAWLEY: THE 9TH.

MR. GAMBLE: HUH?

MS. CRAWLEY: IT'LL BE ON THE 9TH.

MR. GAMBLE: THE HEARING'S COMING UP ON THE 9TH AND IT'LL -- I CAN PREDICT THAT IT'LL GO THE USUAL WAY THESE GO. SHE'LL BE REQUIRED TO HAVE FAMILY COUNSELING AND DRUG COUNSELING AND --

MRS. WHITE: THIS IS ONE, YOUR HONOR, WHERE SHE AND THE BABY TESTED POSITIVE FOR COCAINE RIGHT AFTER THE BABY'S BIRTH AND I THINK THEY NORMALLY JUST ORDER THEM INTO THE SAME TYPE OF THINGS THAT WE'RE TALKING ABOUT, COUNSELING AND DRUG TREATMENT AND SO FORTH.

MR. GAMBLE: MALISSA'S NOW LIVING WITH HER MOTHER OVER ON BEECHWOOD AVENUE HERE IN ANDERSON AND IS WORKING WITH ADAC ALREADY. SHE HAS WORKED AT RYOBI

AND NOW HAS THREE CHILDREN SO IT'S GOING TO BE DIFFICULT FOR HER TO WORK TOO.

THE COURT: SHE HAS NO PRIOR CONVICTION RECORD?

MRS. WHITE: JUDGE, SHE HAS A PRIOR POSSESSION OF MARIJUANA AND DRIVING UNDER THE INFLUENCE FROM 1982.

THE COURT: MS. CRAWLEY, IF I FOLLOW THESE RECOMMENDATIONS DO YOU UNDERSTAND THAT YOU WILL HAVE TO SUCCESSFULLY COMPLETE ANY COUNSELING AS RECOMMENDED FOR SUBSTANCE ABUSE? IF YOU VIOLATE THAT YOU COULD SERVE TIME. DID YOU UNDERSTAND THAT?

MS. CRAWLEY: YES SIR.

THE COURT: I'M GOING TO SENTENCE YOU AS FOLLOWS: FIVE YEARS: FIVE YEARS SUSPENDED ON FIVE YEARS PROBATION -- SPECIAL CONDITIONS OF FIVE YEARS PROBATION YOU WILL BE REQUIRED TO SUCCESSFULLY COMPLETE ANY COUNSELINGS RECOMMENDED FOR SUBSTANCE ABUSE, COMPLY WITH ANY FAMILY COURT ORDERS AND ALSO BE RANDOMLY DRUG TESTED IN THE DISCRETION OF YOUR PROBATION AGENT. COSTS AND ASSESSMENTS AND SUPERVISION FEES ARE WAIVED AND EXEMPT.

DOES MY SENTENCE COMPLY WITH THE NEGOTIATIONS

MRS. WHITE?

MRS. WHITE: YES SIR.

MR. GAMBLE: YES SIR.

THE COURT: THANK YOU.

CERTIFICATE OF REPORTER

I, SUSAN AHEARN-HAWKINS, CVR, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD IN THE CAPTIONED CASE, TO THE BEST OF MY SKILL AND ABILITY, RELATIVE TO APPEAL, IN THE CRIMINAL COURT FOR ANDERSON COUNTY, SOUTH CAROLINA, ON JANUARY 6, 1992.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

s./Susan Ahearn-Hawkins

DATED: October 7, 1994

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
	) PLEAS
COUNTY OF ANDERSON	)
	) Petition for
Malissa Ann Crawley	) Writ of
	) Habeas Corpus
Petitioner,	) 94-CP-04-1280
	)
-vs-	)
	)
Parker Evatt, Commissioner	)
of the South Carolina	)
Department of Corrections,	)
	)
Respondent.	)

The petitioner, Malissa Ann Crawley, alleges and would show to the Court as follows:

1. The petitioner is presently incarcerated with the Leath Correctional Institution of the South Carolina Department of Corrections.

2. The respondent is the Commissioner for the South Carolina Department of Corrections as the petitioner is presently being held within the South Carolina Department of Corrections.

3. On January 6, 1992 the petitioner plead guilty to a charge of Unlawful Neglect of a Child. The facts giving rise to the charge are that the petitioner allegedly took cocaine or crack cocaine while she was pregnant. At the time of her plea the trial judge placed her on probation.

4. On August 5, 1994 the petitioner had her probation revoked and the trial judge sentenced her to five years imprisonment.

5. The petitioner believes that she is being held unlawfully due to the fact that the act to which she plead guilty is not a crime in the State of South Carolina. As a result, the trial court did not have jurisdiction to either accept her plea or to revoke her probation. As the charge against her, based upon the act that she is alleged to have committed, is not a crime within the State of South Carolina, she is being held in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

6. The petitioner requests that this court issue its Writ of Habeas Corpus requiring the defendant to produce the petitioner before the court and to show why the petitioner should not be released from confinement.

WHEREFORE, the petitioner prays that this court issue its Writ of Habeas Corpus requiring the respondent to produce the petitioner before the court and show why the petitioner should not be released from confinement and for such other and further relief as the court may deem just and proper.

September 25, 1994 s./C. Rauch Wise

C. RAUCH WISE
Wise & Tunstall
408 Main Street
Greenwood, SC 29646
(803) 229-5010
S.C. Bar No. 006188

Attorney for Petitioner

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
COUNTY OF ANDERSON	)	COMMON PLEAS
	)	
Malissa Ann Crawley	)	
	)	
Petitioner,	)	
	)	
-vs-	)	
	)	94-CP-04-1280
Parker Evatt, Commissioner of the South Carolina Department of Corrections,	)	
	)	
Respondent.	)	

The petitioner, Malissa Ann Crawley, filed her Habeas Corpus Petition alleging that she plead guilty to a crime that does not exist in South Carolina. She contends she is being held unlawfully in violation of the due process clause of Article I, §3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America. She plead to a violation of S.C. Code § 20-7-50, the child abuse or neglect statute.[1]

Prior to the hearing the parties stipulated to certain facts and introduced exhibits. On January 6, 1992 the

---

[1] The statute provides: "any person having legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-50, the proper care and attention for such child or helpless person, so that the life, health, or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the court.

petitioner pled to a child of child neglect arising out of her giving birth to a child who tested positive for cocaine. On August 5, 1994 the court revoked her probation and sentenced her to five years imprisonment after she was charged with violating her probation. She is presently being held on that charge. The respondent does not contest the authority of the court to grant relief under the South Carolina habeas corpus statute. The sole question for the court is whether the petitioner pled guilty to a crime that does not exist in South Carolina. If she has, the use of the habeas corpus statute is certainly appropriate. *Butler v. State,* 302 S.C. 466, 397 S.E.2d 87 (1990).

The issue involved in this case is identical to several other cases that have arisen in this state. At present the South Carolina Supreme Court has agreed to hear one case that will resolve this case and all other pending cases. The court has reviewed the briefs filed on behalf of both parties filed with the South Carolina Supreme Court. As this case will be controlled by that decision, and all other circuit court that have addressed the issue have resolved the issue in favor of the petitioner, this court feels that it must also grant the relief requested.

The Court by its order does not condone the action of the petitioner in taking drugs while pregnant. The conditions imposed by the court in her appeal bond order hopefully will help the petitioner in her drug abuse problem. The court also recognizes the fact that the state cannot give back to the petitioner any time she may serve while the issue makes its way through the courts. The petitioner can, however, always give the time back to the state in the event this case is reversed.

WHEREFORE, it is hereby order adjudged and decreed that the guilt plea and conviction of the petitioner is hereby set aside. The indictment for a violation of S.C. Code § 20-7-60 is hereby dismissed.

10/17/1994

s./Frank Eppes
FRANK EPPES
Presiding Judge
Anderson County

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Malissa Anne Crawley, Respondent,

v.

Parker Evatt,
Commissioner of the
South Carolina
Department of
Corrections, Appellant.

Appeal From Anderson County
Frank Eppes, Judge

Memorandum Opinion No. 97-MO-117
Submitted December 18, 1996 -
Filed December 1, 1997

REVERSED

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Teresa Knox, and Assistant Attorney General G. Robert Deloach, III, all of Columbia, for appellant.

C. Rauch Wise, of Greenwood, and Lynn M. Paltrow, of New York, New York, for respondent.

PER CURIAM: The State has filed an appeal following the grant of respondent's petition for a writ of habeas corpus. We reverse the grant of habeas corpus and reinstate respondent's conviction for unlawful neglect of a child. *Whitner v. State,* Op. No. 24468 (S.C. Sup. Ct. Refiled October 27, 1997)(Davis Adv. Sh. No. 30 at 27); S.C. Code Ann. § 20-7-50 (Supp. 1995).

REVERSED.

s./Jean H. Toal A.J.

s./John H. Waller, Jr. A.J.

s./E.C. Burnett, III A.J.

We adhere to our dissenting opinions in *Whitner v. State,* Op. No. 24468 (S.C. Sup. Ct. Refiled October 27, 1997)(Davis Adv. Sh. No. 30 at 27) and would affirm.

s./Ernest A. Finney, Jr. C.J.

s./James E. Moore A. J.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

January 8, 1998

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St.
Greenwood, SC 29646

Re: Crawley, Malissa v. Parker Evatt, et al.

Dear Mr. Wise:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

s./ Jean H. Toal A.J.

s./ John H. Waller, Jr. A.J.

s./ E.C. Burnett, III A.J.

I would grant Rehearing.

s./ Ernest A. Finney, Jr. C.J.

s./ James E. Moore A. J.

January 8, 1998."

The remittitur in this matter is today being forwarded to the Clerk of Court for Anderson County.

Very truly yours,

CLERK

CND, Jr./djp

C. Rauch Wise, Esq.
January 8, 1998
Page 2

cc: Attorney General Charles M. Condon
Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Teresa Knox
Assistant Attorney General G. Robert DeLoach, III
Lynn M. Paltrow, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Honorable Frank Epps, Judge

Case No. 97-MO-117

Malissa Ann Crawley,.....Respondent

v.

Parker Evatt,
Commissioner of the South Carolina

Department of
Corrections,.....Appellant

PETITION TO REMAIN ON BOND

The Respondent, Malissa Ann Crawley hereby petitions the Court as follows:

1. Malissa Ann Crawley requests that she be allowed to remain free on bond pending a Petition for Cert to the United States Supreme Court in her case.

2. She was placed on probation on January 6, 1992. Her probation was revoked on July 22, 1994 due to the fact that she got in a fight with her boyfriend and plead guilty to criminal domestic violence for the City of Anderson on July 15, 1994. At the probation revocation hearing, all five

years of her sentence was revoked (See Record on Appeal at 30).

3. Malissa Ann Crawley has maintained a stable home environment since her release on bond in 1994. She has had no violations on any of the conditions of her bond, nor has she been arrested since her release from jail pending this appeal. The attached affidavit of Sherman Lomax attests to her character.

4. Due to the important national issues involved in this appeal and the case of *State v. Whitner,* it is likely that the Supreme Court will hear these cases and make a final ruling.

Wherefore, the Respondent, Malissa Ann Crawley hereby requests that the Court issue its order allowing her to remain free on bond pending a Petition for Writ of Cert to the United States Supreme Court and any final disposition on the Petition for Cert.

December 18 , 1997

s./C. Rauch Wise

C. Rauch Wise
Wise & Tunstall
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Lynn Paltrow
45 West 10th Street
Apt. 3-F
New York, NY 10011
Attorney for Respondent

STATE OF SOUTH CAROLINA)
) **AFFIDAVIT**
COUNTY OF ANDERSON)

PERSONALLY appeared before me Sherman Lomax, who after being duly sworn, deposes and says that:

1. He is a residence of Anderson County and has known Malissa Crawley for since 1988.

2. While he was employed, Malissa Crawley would clean house for him. He was forced to retire because of kidney failure. Earlier this year he had a kidney transplant. While recovering from the kidney transplant, Malissa Crawley has been helping him three days a week as he is unable to clean or maintain his house.

3. During the time he has known Malissa and during the time she has been helping him, he has found her to be an honest and dependable person. On occasions, Malissa has been in his house while he is away. He has always trusted her even when he is not present in the house.

4. He also knows her three children. They are frequently with her while she cleans his house. She has a good relationship with her children. All of her children appear healthy and happy.

SWORN to and Subscribed before me this 18 day of December, 1997

s./Sherman Lomax
SHERMAN LOMAX

s./C. Rauch Wise (L.S.)
Notary Public for South Carolina
My Commission expires:_____

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

January 22, 1998

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St.
Greenwood, SC 29646

Re: Crawley, Malissa v. Parker Evatt, et al.
94-CP-04-1280

Dear Mr. Wise:

The Court has refused your Petition to Remain on Bond in the above referenced matter in the following Order:

"Petition to remain on bond denied.

s./ Jean H. Toal A.J.

s./ John W. Waller, Jr. A.J.

s./ E.C. Burnett, III A.J.

We would Grant.

s./ Ernest A. Finney, Jr. C.J.

s./ James E. Moore A. J.

January 22, 1998."

By copy of this letter, all interested parties are advised of the Court's action in this matter.

C. Rauch Wise, Esquire
January 22, 1998
Page 2

Very truly yours,

CLERK

CND, Jr./djp

cc: Assistant Attorney General G. Robert DeLoach, III
Lynn M. Paltrow, Esquire
The Honorable Linda J. DeShields

South Carolina State Law,
S.C. Code Ann.
§ 20-7-50 (1985)

Any person having legal custody of a child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in section 20-7-490, the proper care and attention for such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

South Carolina State Law,
S.C. Code Ann.
§ 20-7-50 (1997)

§ 20-7-50. Unlawful conduct towards child.

(A) It is unlawful for a person who has charge or custody of a child, who is the parent or guardian of a child, or who is responsible for the care and support of a child to:

(1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;

(2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or

(3) wilfully abandon the child.

(B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.